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No. 06-

In The

Supreme Court of the United States

JAVIER OTONIEL BUSTAMANTE-BARRERA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under derivative citizenship, noncitizen children automatically become citizens when their parents become naturalized citizens. For children who turned eighteen before 2001, 8 U.S.C. 1432(a) provides that if a child's parents were legally separated, the child became a citizen when the parent having legal custody of the child became a naturalized citizen.

This case presents the following question:

Is the determination of whether a legally-separated parent has legal custody of a child under 8 U.S.C. 1432(a) governed by the relevant state's domestic-relations law or federal common law?

The Courts of Appeals are divided on this question.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Javier Otoniel Bustamante-Barrera (Bustamante) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The Court of Appeals' opinion (App., *infra*, 1a) is reported at 447 F.3d 388. The Board of Immigration Appeals' order affirming the Immigration Judge's removal order (App., *infra*, 27a) is unpublished. The Immigration Judge's removal order (App., *infra*, 29a) is unpublished. The Board of Immigration Appeals' order reversing the Immigration Judge and remanding the case (App., *infra*, 30a) is unpublished. The Immigration Judge's order terminating removal proceedings (App., *infra*, 36a) is unpublished.

JURISDICTION

The Court of Appeals' judgment was entered on April 20, 2006. The Court of Appeals denied Bustamante's timely petition for rehearing en banc on June 20, 2006. App., *infra*, 42a. This Court has jurisdiction under 28 U.S.C. 1254(1).

The Court of Appeals had jurisdiction over Bustamante's petition to review the Board of Immigration Appeal's order under 8 U.S.C. 1252(a).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Naturalization Clause of the United States Constitution, Article I, section 8, clause 4, provides: "The Congress shall have Power * * * To establish an uniform rule of naturalization * * * ."

Title 8 of the United States Code, Section 1432(a),[1] provided, in pertinent part:

> (a) A child born outside of the United States of alien parents * * * becomes a citizen of the United States upon fulfillment of the following conditions:
>
> * * *
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents * * * and if
>
> (4) Such naturalization takes place while such child is under the age of eighteen years; and

---

[1] 8 U.S.C. 1432(a) (2000) was repealed by the Child Citizenship Act of 2000 § 103, Pub.L. No. 106-395, 114 Stat. 1631, which became effective on February 27, 2001. The Child Citizenship Act provides for derivative citizenship if either parent becomes a naturalized citizen, but it still requires the naturalized parent to have legal custody of the child. 8 U.S.C. 1431(a). The act only applies to people who were under eighteen on February 27, 2001, however, so people who turned eighteen before then are still governed by § 1432(a). *Drakes* v. *Ashcroft*, 323 F.3d 189, 191 (CA2 2003) (Child Citizenship Act "does not confer citizenship retrospectively"); *United States* v. *Arbelo*, 288 F.3d 1262, 1263 (CA11 2002) (same); *Batista* v. *Ashcroft*, 270 F.3d 8, 15 n.7 (CA1 2001) (same); *Hughes* v. *Ashcroft*, 255 F.3d 752, 757-60 (CA9 2001) (same); *Nehme* v. *INS*, 252 F.3d 415, 430-33 (CA5 2001) (same); *In re Rodriguez-Tejedor*, 23 I.&N. Dec. 153 (BIA 2001) (en banc) (same).

> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of * * * the parent naturalized under clause * * * (3) of this subsection * * * ."

8 U.S.C. 1432(a).

STATEMENT

1. Under derivative citizenship, noncitizen children automatically become citizens when their parents become naturalized citizens. *Ashton* v. *Gonzales*, 431 F.3d 95, 98 (CA2 2005); App., *infra*, 4a. For children who turned eighteen before 2001, both parents had to be naturalized citizens for their child to receive derivative citizenship. 8 U.S.C. 1432(a). But, there is an exception to that rule that is relevant to this case: If his parents were legally separated, then a child who was a legal permanent resident automatically became a citizen when his parent with legal custody was naturalized. *Ibid.*

2. Bustamante was born in Mexico in 1979 to Mexican nationals. App., *infra*, 2a. In 1983, he immigrated to the United States with his parents and became a legal permanent resident. *Ibid.* In 1991, his parents divorced in California. *Ibid.* The divorce decree awarded his mother "sole physical custody" of Bustamante, but awarded both of his parents "joint legal custody." *Ibid.* After the divorce, Bustamante lived with his mother. *Id.* at 40a. In 1994, when Bustamante was fifteen years old, his mother became a naturalized citizen. *Id.* at 3a. His father never did. *Ibid.*

In 2000, Bustamante was convicted in Texas state court of an assault that caused bodily injury to a family member. App., *infra*, 3a. In 2002, he was convicted in Texas state court of an aggravated assault with a deadly weapon and an assault resulting in bodily injury. *Ibid.* After his 2002 convictions, the Department of Homeland Security (DHS) began removal proceedings against him. *Ibid.* DHS contended that Bustamante was an alien who was removable for two reasons: (1) he had been convicted of two crimes involving moral turpitude that did not arise out of a single scheme of criminal misconduct, 8 U.S.C. 1227(a)(2)(A)(ii); and (2) he had been convicted of an aggravated felony. 8 U.S.C. 1227(a)(2)(A)(iii); App., *infra*, 3a. Before the Immigration Judge, Bustamante admitted that he had been convicted of the felonies. *Ibid.* He contended that he was not removable, however, because he was a United States citizen. App., *infra*, 3a; *see* 8 U.S.C. 1227 (only aliens may be removed). Bustamante argued that he received derivative citizenship when his mother became a naturalized citizen. App., *infra*, 3-4a.

In 2002, after DHS had begun removal proceedings, Bustamante's mother obtained a *nunc pro tunc* amended divorce decree from the California court. App., *infra*, 4a, 51a. In its decree, the California court ordered that Bustamante's mother had "sole legal and sole physical custody" of Bustamante, retroactively effective to 1991. *Id.* at 4a, 58a. Based on the California court's *nunc pro tunc* order, the Immigration Judge determined that – because Bustamante's parents were legally separated and his mother had legal custody of him – he received derivative citizenship in 1994 when his mother was naturalized. *Id.* at 5a, 40a. The Immigration Judge terminated the removal

proceeding because DHS had not carried its burden of proving that Bustamante was an alien. *Id.* at 5a, 40a.

DHS appealed the Immigration Judge's decision to the Board of Immigration Appeals (BIA), which reversed the Immigration Judge. App., *infra*, 5a, 35a. The BIA determined that, to receive derivative citizenship under § 1432(a), the child's parent must have sole legal custody of the child. *Id.* at 5a, 31a. The BIA determined that Bustamante's mother did not have sole legal custody because the original divorce decree gave shared legal custody to both parents. *Id.* at 5a, 32a-33a. The BIA refused to give effect to the *nunc pro tunc* amended divorce decree. *Id.* at 5a, 34a-35a. It remanded the matter to the Immigration Judge with instructions to order Bustamante removed, which the Immigration Judge did. *Id.* at 5a-6a, 29a, 35a. Bustamante then appealed the Immigration Judge's decision ordering him removed. *Id.* at 6a, 27a. The BIA dismissed Bustamante's appeal "for the reasons stated" in its prior decision reversing the Immigration Judge. *Id.* at 6a, 28a.

3. Bustamante then filed a petition for review with the Fifth Circuit, arguing that the BIA improperly dismissed his appeal. App., *infra*, 6a. The Fifth Circuit agreed with the BIA that § 1432(a) required that the naturalized parent have sole legal custody of the child. *Id.* at 19a. Following its decision in *Nehme* v. *INS*, 252 F.3d 415 (5th Cir. 2001), regarding parental separation, the Fifth Circuit held that the question of whether a parent has legal custody is not determined by the relevant state's domestic-relations law. *Id.* at 20a-23a. Instead, it created a federal rule for whether a parent had sole legal custody. *Id.* at 20a-25a. The Fifth Circuit said that while this new federal rule was informed by state law, it was "*not* dependent on

the law of any particular state." *Id.* at 22a (emphasis in original). The court noted that Bustamante's "custody status under state law might provide evidence of his * * * status for federal naturalization purposes," but it held that it was "not *bound* by California's determination of his legal relationship with his mother." *Ibid.* (emphasis in original). Therefore, it considered whether Bustamante was "in the sole legal custody of his naturalized parent *as a matter of federal law*." *Id.* at 21a (emphasis in original).

Applying federal law, the Fifth Circuit held that the *nunc pro tunc* amended divorce decree did not give his mother sole legal custody retroactive to 1991. *Id.* at 22a-25a. It concluded that, even if the California "amended decree retroactively altered [Bustamante's] relationship with his mother for some legitimate state purpose, [the court] would not be bound to follow the amended decree in determining [Bustamante's] custody status for purposes of [§ 1432(a)]." *Id.* 22a. Because the Fifth Circuit held that Bustamante's mother did not have sole legal custody of him before he turned eighteen, it concluded that he did not have derivative citizenship and denied his petition for review. *Id.* at 26a.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals are divided over the question presented.

There is a circuit split over whether state or federal law determines whether a parent is legally separated and has legal custody of a child under 8 U.S.C. 1432(a). The Circuits use three separate tests to determine this issue. The Fifth and Second Circuits use federal common law,

while the First, Seventh and Ninth Circuits use the relevant state's domestic-relations law. The Third Circuit uses the relevant state's domestic-relations law to determine whether parents are legally separated, but it uses a different rule for legal custody. If there is a judicial decree concerning the child's custody, the Third Circuit defers to that decree. But, when there is no judicial custody decree, the Third Circuit holds that the parent having actual uncontested custody has legal custody. This Court should resolve the Circuits' disagreement on this important and recurring issue.

A. The Fifth and Second Circuits apply federal common law to determine whether a parent is legally separated and has legal custody of a child.

In its opinion below, the Fifth Circuit held that whether a child is in his parent's legal custody is determined by federal law – not the law of any particular state. App., *infra*, 22a. In so holding, the Fifth Circuit was following *Nehme* v. *INS*, 252 F.3d 415 (CA5 2001), where it held that federal law determined whether parents were legally separated under § 1432(a). In *Nehme*, the Fifth Circuit concluded that while its determination of whether parents were legally separated could be influenced by state law, the law of any one state did not govern. *Nehme*, 252 F.3d at 423-24. In other words, legal separation had a uniform federal definition and was not dependent on the law of any particular state. In the opinion below, the Fifth Circuit likewise held that Bustamante's "custody status prior to his eighteenth birthday is determined by federal law; it is *not* dependent on the law of any particular State. True, his custody status under state law might provide

evidence of his * * * status for federal naturalization purposes; yet, even for these purposes we are not *bound* by California's determination of his legal relationship with his mother." App., *infra*, 22a (emphasis in original).

The Second Circuit follows the Fifth Circuit's rule. In *Brissett* v. *Ashcroft*, 363 F.3d 130 (CA2 2004), the Second Circuit considered whether parents were legally separated under § 1432(a). It held that "naturalization laws must 'be construed according to a federal, rather than state, standard.'" *Brissett*, 363 F.3d at 133 (quoting *Nehme*, 252 F.3d at 422). Accordingly, whether parents are legally separated under § 1432(a) "is determined as a matter of federal common law." *Brissett*, 363 F.3d at 135 n.5. The Second Circuit said that, under its standard, "some orders that the relevant state or nation might not characterize as creating a legal separation may nonetheless effect such a drastic change in the couple's marital existence that the couple may be considered legally separated for purposes of § 1432(a)(3)." *Id.* at 134.

B. The First, Seventh, and Ninth Circuits apply the relevant state's domestic-relations law to determine whether a parent is legally separated and has legal custody of a child.

In contrast, in *Fierro* v. *Reno*, 217 F.3d 1 (CA1 2000), the First Circuit held that the relevant state's domestic-relations law determines whether a parent has legal custody under § 1432(a). The First Circuit noted that while "the phrase 'having legal custody of the child' is, of course, a question of federal statutory interpretation[,] * * * the Immigration and Naturalization Act provides no definition nor does the legislative history illuminate the

concept." *Fierro*, 217 F.3d at 3-4. Because "[l]egal relationships between parents and children are typically governed by state law, there being 'no federal law of domestic relations,'" it held that legal custody presumptively means "legal custody under the law of the state in question." *Fierro*, 217 F.3d at 4 (quoting *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956)). The First Circuit then examined whether the parent had legal custody under Massachusetts law. *Fierro*, 217 F.3d at 6 ("Fierro was under Massachusetts law in the legal custody of his mother * * * .").

In *Wedderburn* v. *INS*, 215 F.3d 795, 799 (CA7 2000), cert. denied, 532 U.S. 904 (2001), the Seventh Circuit similarly held that the relevant state or foreign country's domestic-relations law determines whether a parent has legal custody or is legally separated under § 1432(a). The Seventh Circuit said that legal custody and legal separation, as words in a federal statute, must take their meaning from federal law. "But federal law may point to state (or foreign) law as a rule of decision, and this is how the INS has consistently understood these terms." *Id.* at 799. Applying this rule, the Seventh Circuit examined whether, under Jamaican law, parents who had never formally married could be legally separated and receive legal custody of children. *Ibid.*

In *Minasyan* v. *Gonzales*, 401 F.3d 1069, 1076-77 (CA9 2005), the Ninth Circuit also held that the relevant state's domestic-relations law determines whether parents are legally separated under § 1432(a). It held that legal separation means a separation recognized by law. And, "because there is no federal law of domestic relations, that necessarily means a separation recognized by state law." *Id.* at 1076. The Ninth Circuit cited *Fierro* and *Wedderburn* in support of its decision to apply state law.

Id. at 1077. It then examined California law to determine whether the parents were legally separated. *Id.* at 1078 ("We now turn to California law.").[2]

C. The Third Circuit uses the relevant state's domestic-relations law to determine whether parents are legally separated, but it uses a combination of state and federal law to determine whether a parent has legal custody.

In *Morgan* v. *Attorney General*, 432 F.3d 226, 232 (CA3 2005), the Third Circuit held that the relevant state's domestic-relations law determines whether parents are legally separated. The Third Circuit rejected the idea that it should perform a "general review of the procedures and requirements of various states" to formulate a federal domestic-relations law. *Id.* at 232. Instead, the court held that "it is appropriate to defer to the jurisdictions with authority over the marriage to determine the meaning of legal separation for the purposes of § 1432(a)(3)." *Ibid.* It then examined the laws of Jamaica and Pennsylvania – the states with potential jurisdiction over the marriage – to determine if the parents were legally separated. *Ibid.*

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[2] If Bustamante had never moved from California to Texas, California domestic-relations law would determine whether he was in his mother's legal custody and, therefore, whether he is a citizen. Thus, absent this Court's review, Bustamante's citizenship will be determined by whether the removal proceedings took place in California or Texas. *See* 8 U.S.C. 1252(b)(2) (petition for review of removal order filed in the circuit in which the immigration judge completed the proceedings).

In *Bagot* v. *Ashcroft*, 398 F.3d 252 (CA3 2005), the Third Circuit considered whether a father had legal custody of his child. It followed the Board of Immigration Appeals' precedent in *Matter of M-*, 3 I.&N. Dec. 850, 856, 1950 WL 6650 (BIA 1950), which requires that "in the absence of judicial determination or judicial or statutory grant of custody in the case of legal separation of the parent of a person claiming citizenship[,] * * * the parent having actual uncontested custody is to be regarded as having 'legal custody' of the person concerned for the purpose of determining that person's status * * * ." *Bagot*, 398 F.3d at 263 n.9 (Op. of Becker, J.); *id.* at 269-70 (Rosenn, J., and Nygaard, J., concurring). The Third Circuit held that if there is a state or foreign legal decree granting custody, then it will be followed. If there is no decree, however, then as a matter of federal law the parent with actual uncontested custody has legal custody. *Id.* at 269-70 (Rosenn, J. and Nygaard, J., concurring).

D. The Third Circuit has recognized the circuit split.

The Third Circuit has recognized the circuit split on whether state or federal law determines whether a parent is legally separated and has legal custody under § 1432(a). *Morgan*, 432 F.3d at 232; *see also Bagot*, 398 F.3d at 259 (Op. of Becker, J.). In *Morgan*, the Third Circuit explicitly refused to follow the Fifth Circuit's *Nehme* decision. *Morgan*, 432 F.3d at 232 ("A general review of the procedures and requirements of various states, as conducted in *Nehme*, is inadequate because of the lack of focus on the forums that actually possess the power to decree that a separation recognized and enforceable by law has occurred."). Similarly,

in *Bagot*, Judge Becker recognized the conflict between the First and Seventh Circuits' approach and that of the Fifth Circuit. *Bagot*, 398 F.3d at 259 (Op. of Becker, J.) ("I therefore would not extend *Nehme* to this case; instead, I agree with *Fierro* and *Wedderburn* that it is appropriate to look to state law to define 'legal custody' for the purposes of 8 U.S.C. § 1432(a)(3).").

E. The Circuits handling 88% of immigration appeals have addressed the issue and are split on it.

Six of the twelve Circuits that hear immigration appeals[3] have addressed whether state or federal law determines legal separation and legal custody under § 1432(a). A clear split involving six circuits shows that the issue is ripe for this Court's resolution and that further development in the lower courts is not needed.

The issue's ripeness becomes even more apparent when one considers the percentage of all immigration appeals that these six Circuits hear. The Second and Ninth Circuits – which disagree with each other on the § 1432(a) issue – hear the great majority of immigration appeals. The Second Circuit hears 20% of immigration appeals, and the Ninth Circuit hears 53%. *See* ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD REPORT, Table B-3B (twelve-month period that ended September 30, 2005). Together, the First, Second, Third, Fifth, Seventh, and Ninth Circuits hear 88% of immigration appeals. *Ibid.* Accordingly, there

[3] Because it is not a regional circuit, the Federal Circuit does not hear immigration appeals. 8 U.S.C. 1252(b)(2); 28 U.S.C. 1295.

is no need to wait for the remaining Circuits to consider the issue.

II. Given the importance of the question presented, this Court should resolve the circuit split now.

A. Whether a person is a citizen is an important issue.

"American citizenship is a precious right" *Costello* v. *United States*, 365 U.S. 265, 269 (1961), that carries "priceless benefits." *Schneiderman* v. *United States*, 320 U.S. 118, 122 (1943). This Court has noted that "[i]t would be difficult to exaggerate its value and importance." *Ibid.* Given the high value that this Nation places on United States citizenship, the question whether the federal courts are using the proper analysis to determine citizenship is an important issue.

B. This issue will be a problem for decades.

Even though § 1432(a) has been repealed prospectively, it still applies to people who turned eighteen before 2001.[4] Therefore, people who are now over twenty-four years old are still subject to the law. While the new law makes some changes regarding derivative citizenship, it still requires the naturalized parent to have legal custody for the child to receive derivative citizenship. 8 U.S.C. 1431(a)(3). So, whether state or federal law determines legal custody remains an issue under the new law.

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[4] *Drakes*, 323 F.3d at 191; *Arbelo*, 288 F.3d at 1263; *Batista*, 270 F.3d at 15 n.7; *Hughes*, 255 F.3d at 757-60; *Nehme*, 252 F.3d at 430-33; *In re Rodriguez-Tejedor*, 23 I.&N. Dec. 153.

1. Section 1432(a) still applies to people who turned eighteen before 2001.

Given the nature of derivative citizenship, federal courts will be determining whether people are citizens under § 1432(a) for decades. Under derivative citizenship – unlike naturalization – a person does not have to take any formal act to become a citizen. The person does not have to fill out a form or take an oath.[5] Instead, he automatically becomes a citizen when his parents are naturalized. *Ashton*, 431 F.3d at 98; App., *infra*, 4a.[6] While the person automatically becomes a citizen at that time, he does not have proof of his citizenship until he obtains a certificate of citizenship, 8 U.S.C. 1452(a) ("A person who claims to have derived United States citizenship through the naturalization of a parent * * * may apply to the Attorney General for a certificate of citizenship."), or a passport. 22 U.S.C. 2705(1) (passport has "the same force and effect as proof of United States citizenship as certificate[] * * * of citizenship"). Congress has recognized that a person's status under derivative citizenship is not always clear and

[5] *Cf.* 8 U.S.C. 1432 (2000) ("child born outside of the United States of alien parents * * * becomes a citizen of the United States upon fulfillment of the" requirements for derivative citizenship) and 8 U.S.C. 1431(a) ("child born outside of the United States automatically becomes a citizen of the United States when all of the [requirements for derivative citizenship] have been fulfilled") with 8 U.S.C. 1445 (requiring applicant for naturalization to complete application form) and 8 U.S.C. 1448(a) (requiring applicant for naturalization to take citizenship oath in a public ceremony "in order to be and before being admitted to citizenship").

[6] In fact, 8 U.S.C. 1432 (2000) is titled "Children born outside of United States of alien parents; conditions for automatic citizenship."

that a person can, in good faith, mistakenly believe that he is a derivative citizen.[7]

For many people, their citizenship first becomes an issue when they are convicted of felonies and the government seeks to remove them from the country. *See, e.g.*, *Bagot*, 398 F.3d at 255; *Brissett*, 363 F.3d at 131, *Nehme*, 252 F.3d at 419; *Fierro*, 217 F.3d at 2. That is the first time that the government examines their history to determine whether they truly are derivative citizens. One can be convicted of a felony at any age, so a person could be fifty or sixty years old before the government has to determine whether he is a derivative citizen. A person who was eighteen years old in 2001, when § 1432(a) was repealed, will not be fifty years old until 2033, over a quarter century from now. Because the law in effect when a person turns eighteen determines derivative citizenship, federal courts will be interpreting § 1432(a) for decades to come.

Unless this Court decides whether state or federal law determines legal custody under § 1432(a), federal courts will continue to apply inconsistent law for decades. Given the importance of federal courts applying the correct standard

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[7] Child Citizenship Act of 2000 § 201, Pub. L. No. 106-395, 114 Stat. 1631 (providing that certain people who in good faith thought that they were derivative citizens are exempt from penalties for improperly claiming citizenship or voting in federal elections); *see also* 146 Cong. Rec. H7774, H7776 (daily ed. Sept. 19, 2000) (statement of Rep. Smith) ("In some cases, individuals had a reasonable – if mistaken – belief that they were citizens of the United States."); 146 Cong. Rec. H7774, H7776 (daily ed. Sept. 19, 2000) (statement of Rep. Jackson-Lee) ("The law on automatic citizenship is difficult even for lawyers to understand. I am not at all surprised that people make mistakes when they interpret these provisions."); DAVID LEVY, U.S. CITIZENSHIP AND NATURALIZATION HANDBOOK § 5:2 (2005) ("derivative citizens may be unaware of the fact that they are U.S. citizens").

to determine citizenship, this Court should grant certiorari and determine whether state or federal law applies.

2. The Child Citizenship Act of 2000 keeps the requirement that the naturalized parent must have legal custody for the child to receive derivative citizenship.

Under the Child Citizenship Act of 2000, only one parent has to become a naturalized citizen for the child to have derivative citizenship. 8 U.S.C. 1431(a). Thus, whether the parents are legally separated is no longer an issue. But, the law keeps the requirement that the naturalized parent must have legal custody for the child to receive derivative citizenship. 8 U.S.C. 1431(a)(3) (child must be "in the legal and physical custody of the citizen parent"). Federal courts, therefore, will still have to decide if the naturalized parent had legal custody of the child.

The new law – like § 1432(a) – does not define legal custody. Thus, federal courts will continue to use either the relevant state's domestic-relations law or federal common law to determine legal separation. This means that, unless this Court resolves the issue, the confusion regarding which law applies will continue even under the new law.

III. The relevant state's domestic-relations law – not federal common law – should determine whether a parent has legal custody of a child.

The Fifth Circuit's decision is contrary to this Court's precedent that when Congress uses a domestic-relations term in a statute without defining it, the courts presume that Congress intended to adopt the relevant state's

definition of that term, rather than creating a federal definition. That is the position that the government has taken in previous cases interpreting § 1432(a).

A. When Congress uses a domestic-relations term in a statute without defining it, the term is defined according to the relevant state's domestic-relations law.

Congress did not define "legal custody" in the statute, so federal courts must determine what the term means. As a term in a federal statute, its interpretation is a federal question. But, Congress can point to state law in defining the term, rather than creating a federal definition. *De Sylva*, 351 U.S. at 580 ("The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.").

Congress has the power to create a federal definition of a domestic-relations term used in a federal statute. *Seaboard Air Line Ry.* v. *Kenney*, 240 U.S. 489, 494 (1916). But, because domestic-relations law is a state concern, this Court does not lightly find that Congress intended to create a federal definition.[8] Instead, unless Congress' intent is "express and unambiguous," this Court does not

[8] *United States* v. *Yazell*, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family * * * arrangements."); *State of Ohio ex rel. Popovici* v. *Agler*, 280 U.S. 379, 383 (1930) ("It has been understood that, 'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States' * * * ."") (quoting *Ex parte Burrus*, 136 U.S. 586, 583 (1890)).

assume that Congress has created a federal definition of a domestic-relations term. *Seaboard Air Line Ry.*, 240 U.S. at 494 ("[I]t is obvious that the contention amounts to saying that Congress, by the mere statement of a class, that is, next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the states, and substituted another law for it; when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unambiguous provisions rendering such conclusion necessary.").

Accordingly, when a federal statute uses a domestic-relations term without defining it, this Court presumes that Congress intended to adopt the relevant state's definition of that term rather than create a federal definition. *De Sylva*, 351 U.S. at 580 ("This is especially true where a statute deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern."); *Seaboard Air Line Ry.*, 240 U.S. at 493-94; *see also Levy* v. *Louisiana*, 391 U.S. 73, 80 n.9. (1968) (Harlan, J., dissenting) ("Even where liability arises under a federal statute defining rights in terms of a family relationship to the deceased, federal courts have generally looked to the law and the formalities of the appropriate State.") Following this rule, this Court has held that Congress' undefined use of the terms "children" and "next of kin" referred, not to uniform federal definitions of the terms, but to the relevant states' definitions.[9]

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[9] *De Sylva*, 351 U.S. at 580 (looking to relevant state's definition of "children" when term not defined in federal copyright act); *Seaboard Air Line Ry.*, 240 U.S. at 493-94 ("But, as speaking generally under our dual system of government, who are next of kin is determined by the

(Continued on following page)

Because Congress did not expressly and unambiguously provide a federal definition of "legal custody" in § 1432(a), this Court's precedent presumes that Congress intended the relevant state's definition of that term to apply. The divorce decree giving custody over Bustamante was from a California court (App., *infra*, 2a) so California's domestic-relations law determines whether he was in his mother's sole legal custody. Because the Fifth Circuit held that Bustamante's legal custody was determined under federal – not California – law, its judgment should be reversed and the case remanded for the Fifth Circuit to consider whether Bustamante was in his mother's sole legal custody under California law after she became a citizen and before he was eighteen years old.

B. The government has argued that the relevant state's domestic-relations law controls.

The government has argued that the relevant state's domestic relations law – not federal law – should determine whether a parent is legally separated under § 1432(a). In *Nehme*, the government's brief stated that "[i]t was proper for the immigration judge to apply state law to decide whether Nehme's parents were 'legally separated' when his father was naturalized." Brief of Janet Reno at 13, *Nehme* v. *Reno*, No. 00-60111, 2000 WL 33981409 (CA5 Jun. 26, 2000); *see also* Nehme, 252 F.3d at

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legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law."); *Blagge* v. *Balch*, 162 U.S. 439, 464 (1896) ("congress * * * intended next of kin according to the statutes of distribution of the respective states of the domicile of the original sufferers").

422 ("the INS argued that the term [legal separation] should be defined according to state law"). The government has taken the position that Congress incorporated state domestic-relations law into § 1432(a). Brief of Janet Reno at 14.

C. Applying the relevant state's domestic-relations law does not violate the Naturalization Clause's uniformity requirement.

The Naturalization Clause authorizes Congress "[t]o establish an uniform Rule of Naturalization * * * ." U.S. CONST. art. I, § 8, cl. 4. The Fifth Circuit, in *Nehme*, was concerned that using state law could violate the Naturalization Clause's uniformity requirement because people could be treated differently under § 1432(a) depending on where they lived. *Nehme*, 252 F.3d at 422. While there is little caselaw interpreting the Naturalization Clause's uniformity requirement, the courts that have considered the issue agree that the clause only requires geographic uniformity.[10] Because § 1432(a) applies equally to all of the states, it is geographically uniform, even though differences in state laws may lead to different results when the law is applied.

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[10] *Nehme*, 252 F.3d at 428; *Kharaiti Ram Samras* v. *United States*, 125 F.2d 879, 881 (CA9 1942) ("Regarding the provision in the Constitution empowering Congress to establish a 'uniform' rule of naturalization, we think the restriction of uniformity relates to geography only."); *Petition of Lee Wee*, 143 F. Supp. 736, 737 (S.D. Cal. 1956) ("being uniformly of geographical applicability, [the naturalization law] is not unconstitutional"); *but see Matter of Sullivan*, 680 F.2d 1131, 1135 (CA6 1982) (in a bankruptcy case, noting in dicta – and without citation to authority – that "the naturalization clause has not been interpreted as requiring only geographical uniformity").

The concept of geographic uniformity is borrowed from cases interpreting the Bankruptcy Clause, which also has a uniformity requirement.[11] A law meets the geographic uniformity requirement if it applies equally in all of the states, even though its application may lead to different results because of variations in state law.[12] Thus, this Court has held that while individual state laws on bankruptcy exemptions, the validity of mortgages, and priorities of payments may cause different results under

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[11] U.S. CONST. art. I, § 8, cl. 4 (authorizing Congress "[t]o establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States"). Courts have equated the Bankruptcy Clause and Naturalization Clause uniformity requirements. *Nehme*, 252 F.3d at 428 (applying cases interpreting Bankruptcy Clause uniformity requirement to Naturalization Clause uniformity requirement); *Kharaiti Ram Samras*, 125 F.2d at 881 (using bankruptcy case to interpret Naturalization Clause uniformity requirement); *Lee Wee*, 143 F. Supp. at 737-38; (same); *Darling* v. *Berry*, 13 F. 659, 667 (C.C. Iowa 1882) (equating Bankruptcy Clause and Naturalization Clause uniformity requirements).

[12] *Ry. Labor Executives' Ass'n* v. *Gibbons*, 455 U.S. 457, 469 (1982) ("A bankruptcy law may be uniform and yet 'may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States.' * * * Congress can give effect to the allowance of exemptions prescribed by state law without violating the uniformity requirement.") (*quoting Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918)); *Hanover Nat'l Bank* v. *Moyses*, 186 U.S. 181, 188 (1902) ("The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical, and not personal * * * ."); *Vanston Bondholders Protective Comm.* v. *Green*, 329 U.S. 156, 172-73 (1946) (Frankfurter, J., concurring) ("The Constitutional requirement of uniformity is a requirement of geographic uniformity. It is wholly satisfied when existing obligations of a debtor are treated alike by the bankruptcy administration throughout the country regardless of the State in which the bankruptcy court sits. * * * The Constitution did not intend that transactions that have different legal consequences because they took place in different States shall come out with the same result because they passed through a bankruptcy court.").

bankruptcy law, the bankruptcy law is still geographically uniform. *Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918) ("For example, the Bankruptcy Act recognizes and enforces the laws of the states affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act, although in these particulars the operation of the Act is not alike in all the states.").

Likewise, using state domestic-relations law to determine whether a parent has legal custody does not mean that § 1432(a) is not uniform. In every state, a child became a derivative citizen if his legally-separated parent with legal custody became a naturalized citizen. There is not one derivative-citizenship requirement for California residents and another for Ohio residents. It is true that differences in state domestic-relations law may mean that, under the same circumstances, the California mother had legal custody of her child while the Ohio mother did not, thus making only the California child a citizen. Because the Naturalization Clause only requires geographic uniformity, however, the law is uniform. It is an accepted part of our federal system that, even when federal laws are involved, state laws "may lead to different results in different states." *Stellwagen*, 245 U.S. at 613. Using the relevant state's domestic-relations law, therefore, does not violate the Naturalization Clause's uniformity requirement.

IV. This Court does not have to decide whether Bustamante is a citizen – instead, it should reverse the Fifth Circuit's judgment and remand the case for application of California domestic-relations law.

By granting Bustamante's petition for a writ of certiorari, this Court will not have to determine whether Bustamante is a citizen. The question presented is narrow: Whether state or federal law determines legal custody under § 1432(a). If this Court rules in Bustamante's favor on the question presented, it can remand the case to the Fifth Circuit to determine whether Bustamante was in his mother's legal custody under California law, an issue that the court did not determine. App., *infra*, 21a-23a.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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September 2006

447 F.3d 388

United States Court of Appeals, Fifth Circuit.
Javier Ontoniel BUSTAMANTE-BARRERA,
Petitioner,
v.
Alberto R. GONZALES, U.S. Attorney General,
Respondent.
No. 05-60247.

April 20, 2006.

Chad Van Cleave (argued), Austin, TX, for Petitioner.

Russell J.E. Verby (argued), U.S. Dept. of Homeland Sec., David V. Bernal, Thomas Ward Hussey, Dir., U.S. Dept. of Justice, OIL, Washington, DC, Kenneth L. Pasquarell, Acting Dist. Dir. U.S. INS, San Antonio, TX, Caryl G. Thompson, U.S. INS, Attn: Joe A. Aguilar, New Orleans, LA, for Respondent.

Petition for Review of an Order of the Board of Immigration Appeals.

Before JONES, Chief Judge, and WIENER and PRADO, Circuit Judges.

WIENER, Circuit Judge:

Javier Otoniel Bustamante-Barrera ("Petitioner") seeks review of the Board of Immigration Appeal's ("BIA") dismissal of his appeal from an Immigration Judge's ("IJ") order of removal. Petitioner's challenge to the BIA's decision is based on a former version of 8 U.S.C. § 1432(a), under which Petitioner claims to have automatically derived U.S. citizenship when his mother became a naturalized citizen in 1994. Prior to its amendment in 2000, § 1432(a) granted derivative citizenship to a child born outside the United States to alien parents if, before that

child's eighteenth birthday, (1) he became a legal permanent resident ("LPR") of the United States, (2) his two living parents "legal[ly] separat[ed]," (3) one (but not both) of his parents became a naturalized U.S. citizen, and (4) that naturalized parent had *"legal custody"* of the child.[1] We are concerned today with only the last of these conditions: We must construe § 1432(a)(3)'s "legal custody" requirement to determine whether a child seeking derivative naturalization must have been under the *sole* (as distinguished from *joint*) legal custody of his one naturalized parent. This is a question of first impression in this Circuit, and, because we answer it in the affirmative and perceive no merit in any of Petitioner's other arguments, we deny his Petition for Review.

I. FACTS AND PROCEEDINGS

The facts of this case are not in dispute. Born in Mexico in 1979 to Mexican nationals, Petitioner immigrated here with them in 1983. All three became LPRs of this country that same year. In 1991, Petitioner's parents divorced in California. Their divorce decree awarded his mother "sole *physical* custody" of Petitioner, but awarded both his parents "joint *legal* custody."[2] Following his parents' divorce, Petitioner resided exclusively with his mother. By virtue of his parents' joint legal custody,

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[1] 8 U.S.C. § 1432(a) (2000), *repealed by* Child Citizenship Act of 2000 § 103, Pub.L. No. 106-395, 114 Stat. 1631 (emphasis added). All citations to § 1432(a) herein are to the 2000 version of the U.S.Code. We interpret the pre-Child Citizenship Act version of § 1432(a) because that version was in effect at all times relevant to Petitioner's citizenship claim. *See Bagot v. Ashcroft*, 398 F.3d 252, 257 & n. 3 (3d Cir.2005).

[2] Emphasis added.

however, Petitioner's father retained visitation rights.[3] In 1994, while Petitioner was still a minor under the age of 18, his mother became a naturalized citizen of the United States. His father never did.

Petitioner's tenure in the United States has not been without legal mishaps. In 2000, he was convicted in a Texas state court of assault causing bodily injury to a family member. In 2002, a Texas court again convicted him of assault crimes, this time of aggravated assault with a deadly weapon and assault resulting in a bodily injury, repeat offender. These latter convictions led not only to a sentence of ten years' imprisonment, but also to the initiation of removal proceedings by the Department of Homeland Security ("DHS") in August 2002.

In those immigration proceedings, DHS asserted two bases for Petitioner's removal: (1) He had been convicted of two crimes involving moral turpitude and not arising out of a single scheme of criminal misconduct[4]; and (2) he had been convicted of an aggravated felony.[5] Petitioner admitted his convictions but defended against removal by arguing that the IJ lacked jurisdiction to order Petitioner removed because he is a U.S. citizen. His citizenship, Petitioner insisted, flowed from his meeting the

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[3] The record indicates that Petitioner's mother claimed him as a dependent for tax purposes in 1991, the year that she and Petitioner's father divorced. Her tax returns for the years 1992-2000 are also in the record, however, and she did not claim Petitioner as a dependent for those years. Petitioner's father's tax returns are not part of the record, so we do not know whether he claimed Petitioner as a dependent for any year between 1992 and 2000.

[4] *See* 8 U.S.C. § 1227(a)(2)(A)(ii).

[5] *See id.* § 1227(a)(2)(A)(iii).

requirements for derivative citizenship under the pre-2000 version of § 1432(a), which automatically granted derivative citizenship to specified classes of children born outside of the United States to alien parents.[6] Before the IJ, Petitioner contended that he satisfied § 1432(a)'s requirements because, at the time of his mother's naturalization, he was (1) under the age of 18, (2) under her legal custody, and (3) residing in the United States as a LPR.

Petitioner appears to have recognized a possible problem with his claim to derivative citizenship, however. As noted earlier, his parents' 1991 divorce decree had granted them *joint* legal custody; it did not grant his mother *sole* legal custody. Thus, when Petitioner's mother was naturalized in 1994, his non-citizen father was a legal custodian as well, sharing some parental rights with his ex-wife.

In 2002 – *after* the initiation of Petitioner's removal proceedings at a time when he was 23 years old – his mother sought to eliminate this problem by having his legal custody status changed retroactively. At her request, and without any objection from Petitioner's father, a California court issued a *nunc pro tunc* amended divorce decree ("amended decree") which purported to award Petitioner's mother *sole* legal custody retroactively effective to February 4, 1991. In support of his mother's request for the amended decree, her lawyer filed a declaration candidly stating that "[t]he purpose" for seeking the order was "to satisfy requirements of the Department of Immigration and Naturalization" in regards to Petitioner. In other words, Petitioner's mother

[6] 8 U.S.C. § 1432(a).

expressly sought the amended decree for the sole purpose of affecting the outcome of her major son's removal proceeding.

Faced with the amended decree, the IJ concluded that Petitioner met the requirements for derivative citizenship under § 1432(a). Reasoning that DHS had not carried its burden of proving that Petitioner was an alien, the IJ terminated the removal proceedings.

DHS appealed the IJ's decision to the BIA, which, in October 2003, reversed in favor of DHS. The BIA interpreted § 1432(a)(3) as requiring that a LPR with two living parents, only one of whom is a naturalized citizen, does not automatically derive citizenship from his naturalized parent unless that parent had *sole legal* custody over the LPR *prior to* his eighteenth birthday. Because Petitioner's mother had not been his sole legal custodial parent before his eighteenth birthday, the BIA sustained DHS's appeal. In so doing, the BIA refused to credit the retroactive effect of the California court's amended decree for purposes of removal.

The BIA viewed the amended decree as nothing more than a legal fiction created for the express purpose of manipulating federal immigration and naturalization law. "To allow courts to circumvent the clear language of the naturalization requirements . . . is contrary to public policy and decades of Supreme Court jurisprudence requiring strict compliance with . . . statutory requirements to obtain citizenship."[7] The BIA remanded the case

[7] *In re: Bustamante-Barrera*, No. A38-097-162, at 3 (BIA Oct. 3, 2003) ("*Bustamante-Barrera I*").

to the IJ with instructions to order Petitioner removed, and the IJ did so on remand.

Petitioner appealed the IJ's removal order to the BIA, arguing that by ignoring the amended decree, the BIA (1) overstepped its legal authority; (2) violated the Full Faith and Credit Act[8]; and (3) violated the Equal Protection component of the Fifth Amendment's Due Process Clause. In March 2005, the BIA rejected each of these arguments "for the reasons stated" in its October 2003 decision.[9] Petitioner then filed the instant Petition for Review.[10]

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[8] 28 U.S.C. § 1738.

[9] *In re: Bustamante-Barrera,* No. A38-097-162, at 1 (BIA Mar. 2, 2005).

[10] Before the BIA, Petitioner did "not contest the argument that" § 1432(a)(3)'s reference to "legal custody" requires sole legal custody. *Bustamante-Barrera I* at 2. Instead, it appears that Petitioner raised the argument for the first time in his Petition for Review filed with us. Ordinarily, we will not consider an argument raised for the first time on appeal, but we do have discretion to do so. *See In re HECI Exploration Co.,* 862 F.2d 513, 521-22 (5th Cir.1988) (stating that we have discretion to "consider an argument advanced for the first time on appeal," but, "ordinarily[,] only if the issue is a purely legal one and if consideration of the argument is necessary to avoid a miscarriage of justice"). The issue whether § 1432(a)(3)'s reference to "legal custody" requires sole legal custody is purely a legal one. And, considering the grave consequence facing Petitioner if he fails – removal from the country in which he grew up – we consider *HECI Exploration Co.*' s "miscarriage of justice" requirement to be satisfied. Moreover, Respondent has not argued that Petitioner waived the argument that § 1432(a)(3) is satisfied by joint legal custody; indeed, Respondent has significantly briefed the question. We thus proceed to consider it.

II. ANALYSIS

A. Jurisdiction

As a general rule, we have jurisdiction to review the BIA's removal orders.[11] Congress created an exception, however, that deprives us of jurisdiction to review removal orders issued against aliens convicted of, *inter alia,* an aggravated felony or a crime involving moral turpitude.[12] Congress has curtailed this jurisdiction strip, though, by making clear that we retain jurisdiction to review "constitutional claims or questions of law" raised in a petition for review filed by a criminal alien.[13] All four of Petitioner's claims fall within one or the other of these two categories: Three of his arguments are legal[14] and the fourth is constitutional.[15] We thus have jurisdiction to review each of them, even if it turns out that Petitioner is indeed an alien.

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[11] *See* 8 U.S.C. § 1252(a)(1).

[12] *See id.* § 1252(a)(2)(C).

[13] *Id.* § 1252(a)(2)(D).

[14] Petitioner argues that he derivatively obtained citizenship under § 1432(a) because (1) that provision is satisfied by a grant of joint legal custody over an alien child; (2) despite the California court's grant to his parents of joint legal custody, his mother had effective sole legal custody of him; and (3) the amended decree proves that his mother had sole legal custody of him.

[15] Petitioner argues that the BIA's application of § 1432(a) violated the equal protection component of the Fifth Amendment's Due Process Clause.

B. Bustamante-Barrera's citizenship status under § 1432(a)

1. Standard of review

We review each of Petitioner's claims *de novo*. Under the plain words of 8 U.S.C. § 1252(b)(5)(A), we are empowered to "decide [a putative citizen's] nationality claim" if we "find[] from the pleadings and affidavits that no genuine issue of material fact about [his] nationality is presented." We agree with the parties that this case presents no material fact issues, so our review of the three legal arguments and one constitutional argument that comprise Petitioner's claim to U.S. citizenship is *de novo*.[16]

That our review is *de novo* does not, however, answer whether we must defer to the BIA's interpretation of § 1432(a). Usually, the BIA's reasonable interpretation of an ambiguous provision of the INA (which, in general, it administers) is entitled to *Chevron* deference.[17] But *Chevron* deference will apply here only if Congress has delegated authority *to the BIA* to clarify a statutory

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[16] *See* 8 U.S.C. § 1252(b)(5)(A) ("If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim."); *see also Singh v. Gonzales*, 436 F.3d 484, 487 (5th Cir.2006) (stating that we decide legal claims made in a petition for review *de novo*); *Soadjede v. Ashcroft*, 324 F.3d 830, 831 (5th Cir.2003) (stating that we decide constitutional claims made in a petition for review *de novo*).

[17] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); *see Singh*, 436 F.3d at 487.

ambiguity.[18] If Congress has not done so, then we are not required to defer to the BIA's interpretation.

There is disagreement among the circuits as to whether the BIA's interpretation of § 1432(a) is entitled to *Chevron* deference. The Ninth Circuit insists that it is not, reasoning that Congress has delegated responsibility for deciding nationality claims *to the federal courts.*[19] That circuit makes the point that 8 U.S.C. §§ 1252(b)(5)(A) and (B) expressly provide that the federal courts "shall decide [a] nationality claim" presented in a petition for review. The Second Circuit appears to be unconvinced. It recently accorded *Chevron* deference to the BIA's interpretation of § 1432(a), albeit without ever questioning whether such deference was warranted.[20]

We have not weighed in on this precise issue, and neither party has briefed it. In *Nehme v. INS,* however, we addressed a very similar issue and held that the BIA's interpretation of § 1432(a) is *not* entitled to *Chevron* deference.[21] *Nehme* was decided in the context of determining whether we had *jurisdiction* to review a removal order issued against a criminal alien.[22] As we stated there, the question whether we have jurisdiction in a particular case is subject to plenary review. In other words, we interpret statutes that operate to deprive us of jurisdiction *de novo,*

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[18] *See* 467 U.S. at 843-44, 104 S.Ct. 2778.

[19] *See Minasyan v. Gonzales,* 401 F.3d 1069, 1074 (9th Cir.2005).

[20] *See Brissett v. Ashcroft,* 363 F.3d 130, 133 (2d Cir.2004).

[21] 252 F.3d 415, 420 (5th Cir.2001).

[22] *See id.*

without regard to an administrative agencies preferred interpretation of the statute.[23]

Nehme's holding, however, does not control our interpretation of § 1432(a)(3). After all, our inquiry today is not jurisdictional: It was after we decided *Nehme* that Congress amended the judicial review provisions of the INA to clarify that we retain jurisdiction over constitutional and legal claims made by a criminal alien in a petition for review.[24] At the time that we decided *Nehme,* the INA merely deprived us of jurisdiction to entertain petitions for review filed by specific sub-classes of criminal aliens. The question whether the petitioner in *Nehme* was in fact an alien went straight to our jurisdiction: If he was, we did not have jurisdiction; if he was not, we did. Here, in contrast, § 1252(a)(2)(D) grants us jurisdiction to hear Petitioner's legal and constitutional claims, regardless of whether he is an alien. *Nehme*'s holding that we must interpret § 1432(a) *de novo* to determine our jurisdiction is thus not controlling.

For today's purposes, however, the question of *Chevron*'s applicability is beside the point: As we agree with the BIA's interpretation of § 1432(a), our conclusion in this case would be the same whether we were to interpret the statute *de novo* or, instead, within *Chevron*'s framework. If we were operating under *Chevron,* we would defer to the BIA's interpretation of § 1432(a) as reasonable; and when we interpret the statute *de novo,* we reach the same conclusion as did the BIA. As we thus would affirm the BIA's interpretation as the appropriate one under either

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[23] *Id.*

[24] *See* 8 U.S.C. § 1252(a)(2)(D).

standard of review, we need not determine whether the BIA's interpretation is entitled to *Chevron* deference.

2. *Bustamante-Barrera's claim to U.S. citizenship*

"There are 'two sources of citizenship, and two only: birth and naturalization.'"[25] As Petitioner was not born in the United States, naturalization is his sole source for a claim of citizenship. Naturalization is available "only as provided by Acts of Congress"[26] and, even then, only "in strict compliance with the terms of" such acts.[27] Petitioner has the burden of proving that he qualifies for naturalization, and he must do so in the face of the Supreme Court's mandate that we resolve all doubts "in favor of the United States and against" those seeking citizenship.[28]

In his claim to derivative naturalization, Petitioner contends that he *automatically* became a citizen in 1994 when his mother was naturalized. His argument tracks the version of § 1432(a) that was in effect in 1994. It granted derivative citizenship to child[ren] born outside of the United States [to] alien parents . . . upon fulfillment of [, *inter alia,*] the following conditions: . . .

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[25] *Miller v. Albright,* 523 U.S. 420, 423, 118 S.Ct. 1428, 140 L.Ed.2d 575 (1998) (quoting *United States v. Wong Kim Ark,* 169 U.S. 649, 702, 18 S.Ct. 456, 42 L.Ed. 890 (1898)).

[26] *Id.* at 424, 118 S.Ct. 1428.

[27] *INS v. Pangilinan,* 486 U.S. 875, 884, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988).

[28] *Berenyi v. Dist. Dir., INS,* 385 U.S. 630, 637, 87 S.Ct. 666, 17 L.Ed.2d 656 (1967).

> (3) The naturalization of *the* parent having *legal custody* of the child *when there has been a legal separation of the parents* . . . ; and *if*
>
> (4) [s]uch *naturalization takes place while* such child is *under the age of eighteen years;* and
>
> (5) [s]uch child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the custodial parent's naturalization.[29]

None dispute that Petitioner satisfies all but one of these conditions: (1) He was born outside of the United States to alien parents; (2) his parents' 1991 divorce (which occurred while he was under the age of 18) qualifies as a "legal separation"; (3) his mother was naturalized while he was under the age of 18; and (4) at the time of his mother's naturalization, Petitioner was residing in the United States as a LPR. Thus, Petitioner's status as a derivatively naturalized citizen turns entirely on § 1432(a)'s fifth condition, viz., whether, before he reached the age of 18, his parents' joint custody regime satisfied § 1432(a)(3)'s requirement that "the" naturalized parent be "the" parent having legal custody.

This case, then, is one of federal statutory interpretation. We must construe the one of § 1432(a)(3)'s express conditions that requires "the parent having legal custody of the child" to have been naturalized and determine whether this condition requires that parent to have had *sole,* as opposed to *joint,* legal custody. This issue is one of first impression, not only in this Circuit but also, it

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[29] 8 U.S.C. § 1432(a)(3)-(5) (emphasis added).

appears, in all of the federal circuits.[30] In the end, we hold that only sole legal custody satisfies § 1432(a)(3). Two factors lead us to this conclusion: (1) the text of § 1432(a)(3) and its relation to the overall scheme of the INA; and (2) § 1432(a)'s purpose, as demonstrated by its legislative history. As Petitioner cannot meet his burden of proving that he was in the sole legal custody of his naturalized mother prior to his eighteenth birthday, he cannot obtain derivative citizenship. We must, therefore, deny his petition for review.

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[30] Respondent disagrees, contending that all "[t]he courts that have addressed this issue have reached the" conclusion that § 1432(a)(3) requires sole legal custody. In support of this assertion, Respondent cites *Minasyan*, 401 F.3d at 1069, *Batista v. Ashcroft*, 270 F.3d 8 (1st Cir.2001), and *Espindola v. Barber*, 152 F.Supp. 829 (N.D.Cal.1957). None of these cases, however, addressed the precise issue we face today. The *Minasyan* court interpreted a different term from § 1432(a)(3) – "legal separation" – not the phrase at issue today. *See* 401 F.3d at 1076. The *Batista* court merely assumed that sole custody is required, but did not engage in an analysis of the issue. *See* 270 F.3d at 15-16. And in *Espindola*, it was conceded that the "legal custody" requirement was met. *See* 152 F.Supp. at 831.

To be sure, other courts have faced similar issues, but none that we have found has faced this precise one. The Third Circuit, for example, interpreted "legal custody" in § 1432(a)(3) to be satisfied when no formal decree has granted either parent legal custody of the child, but the child nonetheless resides in the "actual uncontested custody" of the naturalized parent. *See Bagot*, 398 F.3d at 266. The First and Ninth circuits have also interpreted "legal custody," but neither court has considered whether § 1432(a)(3) requires sole legal custody. *See Fierro v. Reno*, 217 F.3d 1 (1st Cir.2000); *Tabucbuc v. Ashcroft*, 84 Fed.Appx. 966 (9th Cir.2004) (unpublished per curiam opinion). And we, along with at least three other circuits, have interpreted the term "legal separation" in § 1432(a)(3). *See Minasyan*, 401 F.3d at 1069; *Brissett*, 363 F.3d at 130; *Nehme*, 252 F.3d at 415; *Wedderburn v. INS*, 215 F.3d 795 (7th Cir.2000). Each of these decisions informs our analysis, but none controls it.

3. Obtaining derivative citizenship under 8 U.S.C. § 1432(a)

We start with the statute's text. As earlier explained, § 1432(a)(3) grants derivative citizenship to a child born outside of the United States to alien parents only if, *inter alia,* "the parent having legal custody of the child" has been naturalized. To determine whether these words require sole legal custody, we must construe the entire phrase.

Petitioner would have us frame the issue more narrowly, restricting our interpretation to but two words of this eight-word phrase, "legal custody." Indeed, Petitioner's core argument – that reading "legal custody" to require "sole legal custody" would be to amend § 1432(a)(3) judicially – might have more force if "legal custody" were indeed the only words that we must construe. But the words "legal custody" do not stand alone in § 1432(a)(3); rather, they immediately follow, and must be read *in pari materia* with, the whole descriptive phrase, which begins with and includes "the parent having." Stated another way, "the parent having legal custody" cannot be parsed to consider, in a vacuum, just "the parent" or "legal custody." The *who* is "the parent"; but, being singular, more must be known, viz., whether "the" parent in question is the one with "legal custody." The words "the parent" are thus modified by the words "having legal custody." Only together do these words describe *who* must have "the" legal custody of a child if that child is to derive citizenship.

As noted, Congress chose to identify which progenitor must have legal custody by using the *singular form* of "parent": A child derives citizenship under § 1432(a)(3)

only if "*the* parent having legal custody of the child" was himself or herself naturalized.[31] Congress's use of the singular form is telling. It leaves no room to dispute that, when only one of two legally separated parents is a naturalized U.S. citizen, that parent is the one who must have legal custody. Had Congress meant that § 1432(a)(3)'s requirements could be met when two legally separated parents shared *joint* legal custody of a child and only one of those two parents was naturalized, it could have used more inclusive language to signify as much. For example, Congress could easily have specified "the parent *or parents* having legal custody of the child."

Not surprisingly, Congress has used just such more inclusive language in other parts of the INA where the term "legal custody" is employed. For example, 8 U.S.C. § 1101(b)(1)(C)[32] defines "child" as used in specified portions of the INA to include, among others, "a child legitimated under the law of the child's residence or domicile, . . . if such legitimation takes place before the child reaches the age of eighteen years and the child is in the *legal custody* of the legitimating *parent or parents* at the time of such legitimation."[33] And, in § 1101(b)(1)(E)(i), Congress defined "child" to include "a child adopted while under the age of sixteen years if the child has been in the *legal custody* of, and has resided with, the adopting *parent or parents* for at least two years."[34] Finally, 8 U.S.C.

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[31] 8 U.S.C. § 1432(a)(3) (emphasis added).

[32] For consistency's sake, all references in this part of the opinion to provisions in title 8 of the U.S.Code are to the 2000 version of the Code.

[33] 8 U.S.C. § 1101(b)(1)(C) (emphasis added).

[34] 8 U.S.C. § 1101(b)(1)(E)(i) (emphasis added).

§ 1101(c)(1), which also defines "child" (but for other portions of the INA), requires that "the child [be] in the *legal custody* of the legitimating or adopting *parent or parents.*"[35]

By their plain language, these three INA provisions are expressly satisfied either if one of two parents has sole legal custody or if the two parents share joint legal custody. Congress's use of "parent *or parents*" in these provisions contrasts sharply with its exclusive use of the singular form of "parent" in § 1432(a)(3). We cannot ignore this distinction between different provisions in the same statute without violating a well-established canon of statutory construction: We must read the statute as a whole, so as to give effect to each of its provisions without rendering any language superfluous.[36] Were we to read § 1432(a)(3)'s use of "the parent" (singular) as also permitting *joint* legal custody, we would effectively read the words "or parents" out of §§ 1101(b) and (c)'s definitions of "child." This we may not – and will not – do. Given Congress's use of "parent or parents" in §§ 1101(b) and (c), we are confident that, had Congress intended § 1432(a)(3) to be satisfied by either sole or joint legal custody, it would have used the same words or at least very similar ones. That it did not do so confirms to us that joint legal custody does not meet § 1432(a)(3)'s requirements. Only sole legal custody will suffice.

As demonstrated by its legislative history, § 1432(a)'s *purpose* bolsters our conclusion that the statute requires

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[35] 8 U.S.C. § 1101(c)(1) (emphasis added).

[36] *See Beck v. Prupis*, 529 U.S. 494, 506-07, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000).

sole legal custody. Congress enacted the provision "to ensure that only those alien children whose 'real interests' were located in America with their custodial parent [singular], and not abroad, should be automatically naturalized."[37] This provision was adopted to "promote marital and family harmony and . . . prevent the child from being separated from an alien parent who has a legal right to custody."[38] In other words, Congress meant for § 1432(a) to protect the rights of *both* parents for as long as each one of them has legal rights over the child. This is why, when we were asked in *Nehme* to determine whether an *informal* separation of a married couple satisfied § 1432(a)(3)'s "legal separation" requirement, we answered in the negative:

> It makes sense . . . that when the child's parents are still married, the child does not *automatically* acquire a new citizenship upon the naturalization of only one parent . . . . [W]e think Congress clearly intended that the naturalization of only one parent would result in the automatic naturalization of an alien child only when there has been a formal, *judicial* alteration of the marital relationship.[39]

After all, only when there has been a "formal . . . alteration of the marital relationship" could the federal

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[37] *Nehme*, 252 F.3d at 425; *see also* S.Rep. No. 2150, at 4 (1940); 86 Cong. Rec. 11,945-53 (1940); H.R.Rep. No. 82-1365, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680.

[38] *Nehme*, 252 F.3d at 425.

[39] *Id.* at 425-26 (emphasis in original).

courts be confident that the non-custodial, non-naturalized parent truly has no rights over the child.[40]

Other circuits have also interpreted § 1432(a) as serving the purpose of protecting parental rights. The Ninth Circuit, for example, views § 1432(a) as a measure meant to "prevent[ ] the naturalizing parent from usurping the parental rights of the alien parent."[41] And, in *dicta,* the Seventh Circuit reasoned that § 1432(a) protects parents' rights by "limit[ing] automatic changes [in citizenship] to situations in which the other parent has been *removed from the picture* – either by death or by 'legal separation.' "[42] A legally separated parent with joint legal custody – such as Petitioner's father – has not "been removed from the picture"[43] to such a degree that he has no legal rights over his child. Thus, the naturalization of such a parent's ex-spouse should not lead to an *automatic* change in his child's citizenship. That kind of change could seriously interfere with the non-naturalized parent's rights, and thereby undermine § 1432(a)'s purpose.

In addition, interpreting § 1432(a)(3) as amenable to being satisfied by a decree of joint legal custody would lead to an absurd result: (1) *not* recognizing derivative citizenship when an alien child's parents are *married* and only one parent is naturalized,[44] while (2) *recognizing* derivative

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[40] *See id.*

[41] *Barthelemy v. Ashcroft,* 329 F.3d 1062, 1066 (9th Cir.2003).

[42] *Wedderburn,* 215 F.3d at 800 (emphasis added); *see also Minasyan,* 401 F.3d at 1079; *Fierro,* 217 F.3d at 6.

[43] *Wedderburn,* 215 F.3d at 800.

[44] Under 8 U.S.C. § 1432(a)(1), if a child's parents are both living and are not "legal[ly] separat[ed]," then derivative citizenship is

(Continued on following page)

citizenship when an alien child's parents are *legally separated,* continue to share legal custody (and thus legal rights) over the child, and only one parent is naturalized. Inasmuch as, in each example, *both* parents share rights over the child, we can conceive of no non-absurd reason – and Petitioner has furnished us none – why Congress would grant derivative citizenship to the child of the legally separated parents but not to the child of the married parents. We decline Petitioner's invitation to read § 1432(a)(3) in a way that reaches such an incongruous result. We hold instead that § 1432(a)(3)'s requirement that "the parent having legal custody of the child" be a naturalized citizen of the United States is satisfied only when but one of two living and legally separated parents is a naturalized U.S. citizen and that parent is vested with the *sole* legal custody of the child.

4. Whether, prior to his eighteenth birthday, Bustamante-Barrera was in the sole legal custody of his mother

Petitioner concedes that the 1991 divorce decree granted his parents *joint* legal custody. This decree is the only evidence in the record relevant to his custodial status prior to his eighteenth birthday. In the absence of evidence contradicting the 1991 divorce decree, we must conclude that Petitioner did not derive citizenship *ipso facto* at the time of his mother's subsequent naturalization in 1994.

Petitioner nevertheless advances three arguments to support his derivative citizenship claim. First, he contends

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available only on "[t]he naturalization of *both* parents." (Emphasis added).

that he automatically derived citizenship under § 1432(a) when his mother was naturalized because, even if we disregard the original divorce decree's plain language and meaning under California law, he was, for purposes of federal immigration law, *effectively* in the sole legal custody of his mother prior to his eighteenth birthday. Second, Petitioner insists that under the Full Faith and Credit Act,[45] we must apply the amended decree to his naturalization claim under § 1432(a). He notes that the amended decree retroactively grants his mother sole legal custody as of the date of the original judgment of divorce, which was rendered before his eighteenth birthday. Finally, Petitioner contends that our failure to recognize his derivative naturalization would violate the Equal Protection component of the Fifth Amendment's Due Process Clause.

a. Whether Bustamante-Barrera was effectively in the sole legal custody of his mother prior to his eighteenth birthday

On a purely theoretical level, Petitioner's first argument has some appeal – but not enough to carry the day. Interpretation of § 1432(a)(3) is a matter of *federal law.*[46] And, because of the overarching constitutional interest in uniformity of federal immigration and naturalization laws,[47] we have previously "reject[ed the] contention that the law of any one state should govern the determination" under § 1432(a)(3) "whether an alien child's parents were

[45] 28 U.S.C. § 1738.

[46] *Nehme,* 252 F.3d at 422-23.

[47] *See* U.S. Const. art. I, § 8, cl. 4 (granting Congress the power "[t]o establish an uniform Rule of Naturalization").

'legally separated.'"[48] Especially given *Nehme*'s firm rejection of the contention that the meaning of the term "legal separation" in § 1432(a)(3) is controlled by any given state's domestic relations law, we are satisfied that neither may a child's "legal custody" status be controlled by any one state's law. It is true, at least in theory, that a LPR child seeking derivative citizenship under § 1432(a) might prove that, despite a state's explicit grant of joint legal custody to his parents, he must be regarded as being (or having been) in the sole legal custody of his naturalized parent *as a matter of federal law.*[49] In this case, however, Petitioner has failed to prove that, for federal naturalization purposes, he should be regarded as having effectively been in the sole legal custody of his mother at the time of her naturalization. In fact, he has offered us *no* evidence to that effect; he merely asserts as much conclusionally in his brief. Such a bald assertion is not sufficient to meet his burden of proving his claim to citizenship; neither is it enough to create an issue of material fact that would require a hearing before a district court.[50]

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[48] *Nehme*, 252 F.3d at 424 (emphasis added); *see also* 8 U.S.C. § 1432(a)(3) (granting derivative citizenship to a minor child of alien parents upon "[t]he naturalization of the parent having legal custody of the child *when there has been a legal separation of the parents*") (emphasis added).

[49] *Cf. Nehme*, 252 F.3d at 427 (reasoning that the petitioner could have attempted to prove that, despite his parents' lack of a formal legal separation under state law, they should be regarded as legally separated under federal law).

[50] *See* 8 U.S.C. § 1252(b)(5)(B) ("If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim . . . ."); *Agosto v. INS*, 436

(Continued on following page)

b. The effect of the amended decree

Likewise without merit is Petitioner's second contention, i.e., that, at the time of his mother's naturalization, he met § 1432(a)(3)'s sole legal custody requirement because the 2002 amended decree expressly and retroactively grants her sole legal custody as of the date of her 1991 divorce. Petitioner insists that we are bound by the Full Faith and Credit Act[51] to recognize California's amended decree as having such retroactive effect. We disagree.

Our refusal to credit the amended decree for purposes of federal immigration law does not even implicate the Full Faith and Credit Act. For purposes of § 1432(a), Petitioner's custody status prior to his eighteenth birthday is determined by federal law; it is *not* dependent on the law of any particular state. True, his custody status under state law might provide evidence of his such status for federal naturalization purposes; yet, even for these purposes, we are not *bound* by California's determination of his legal relationship with his mother. Stated differently, even assuming *arguendo* that the state's amended decree retroactively altered Petitioner's relationship with his mother for some legitimate state purpose, we would not be bound to follow the amended decree in determining Petitioner's custody status for purposes of the subject section

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U.S. 748, 754-57, 98 S.Ct. 2081, 56 L.Ed.2d 677 (1978) (holding that traditional summary judgment principles govern the determination whether a petitioner claiming nationality has created an issue of material fact warranting a hearing in the district court).

[51] 28 U.S.C. § 1738. The Full Faith and Credit Act mandates that federal courts accord the same "full faith and credit" to state "judicial proceedings" as other courts of the state from which the state court judgment comes would accord the judgment. *Id.*

of the INA. Federal naturalization law exists independent of state family law. Here, we do not question the amended decree's *validity* – a question that, in other circumstances, the Full Faith and Credit Act might prohibit our asking. But the Full Faith and Credit Act certainly does not require us to accord that state decree conclusive effect in U.S. *naturalization* proceedings.

We are not the first court to address the effect of a *nunc pro tunc* order on a § 1432(a)(3) analysis. Facing similar circumstances in *Fierro,* the First Circuit rejected the assertion that a *nunc pro tunc* amended custody decree obtained for the express purpose of affecting the outcome of federal immigration proceedings satisfied § 1432(a)(3)'s "legal custody" requirement.[52] Born in Cuba, Fierro and his parents immigrated to the United States in 1970. When his parents divorced in 1973, his mother was granted custody in the divorce decree.[53] In 1976, Fierro became a LPR, and in 1978, when Fierro was still under the age of 18, his non-custodial father became a naturalized U.S. citizen. Twenty years later, while a middle-aged Fierro was facing removal proceedings, a Massachusetts court entered a *nunc pro tunc* order that granted his father legal custody effective retroactively to 1977.[54] To obtain that court order, both of Fierro's parents had expressly averred that the post-hoc "modification [of his custody status] is necessary for [him] to derive citizenship through his father and avoid being deported to Cuba."

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[52] 217 F.3d at 1.

[53] *Id.* at 2.

[54] *Id.*

The Massachusetts court acquiesced and entered the *nunc pro tunc* order, after which Fierro insisted that he was not removable because he had derived citizenship when his father was naturalized in 1978. As evidenced by the *nunc pro tunc* order, argued Fierro, he was in his father's legal custody at that time. The First Circuit rejected this argument, reasoning, *inter alia,* that reliance on such an order as the basis of derivative citizenship would open the floodgates for abuse, "allow[ing] . . . state court[s] to create loopholes in the immigration laws on grounds of perceived equity or fairness."[55]

The instant case is strikingly similar to *Fierro.* After Petitioner's removal proceeding had been initiated – which was years after he had reached the age of 18 – Petitioner's mother was successful in having her 11 year-old divorce decree amended retroactively for the sole purpose of blocking her son's removal from the United States. We agree with the First Circuit that relying on such a *nunc pro tunc* order to recognize derivative citizenship would create the potential for significant abuse and manipulation of federal immigration and naturalization law. We therefore decline to credit it.

We should not, though, be seen as foreclosing any possibility that there could be a situation in which such a *nunc pro tunc* amended decree could enhance an alien's claim of derivative citizenship under § 1432(a). It is at least possible that circumstances could exist in which such a decree would legitimately demonstrate that an alien child had in fact been in the sole legal custody of his one naturalized parent prior to his eighteenth birthday. This,

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[55] *Id.* at 6.

however, is not such a case. The record here confirms that Petitioner's mother sought the amended decree solely for the purpose of controlling immigration and naturalization law. We refuse to reward such blatant manipulation of federal law.

c. Bustamante-Barrera's Equal Protection claim

In a last-ditch effort to avoid removal, Petitioner asserts that our refusal to recognize the amended decree as sufficient to satisfy § 1432(a)(3)'s sole legal custody requirement would violate the Equal Protection component of the Fifth Amendment's Due Process Clause. He argues that he is similarly situated to an alien child whose parents' original separation decree placed the child in the sole legal custody of his one naturalized parent. This is so, argues Petitioner, because his "status, as determined by the California court, is legally the same as if he were originally placed in the sole legal custody of his mother at the time of the [original] custody" decree. It would be irrational, he contends, to treat him differently only because a retroactive *nunc pro tunc* order – distinct from an original decree – dictates his custody status.

This argument too is meritless. As we explained earlier, we need not – and therefore do not – rule out the possibility that some set of circumstances might exist in which we would recognize a *nunc pro tunc* amended divorce decree as sufficient to prove sole legal custody under § 1432(a)(3). In such a hypothetical case, there would be no differential treatment between, on the one hand, a minor child who was unquestionably in the sole legal custody of his naturalized parent from the outset, and, on the other hand, one whose parents' original

custody decree placed him in the joint legal custody of both of his parents but who, *in actuality,* was in the sole legal custody of his one naturalized parent. Petitioner argues that he falls within the latter category and that it would be irrational to treat him differently than children in the former one. But Petitioner does not fall within the latter group: He has shown us no evidence that the amended decree is effective for purposes of federal immigration and naturalization law. On the contrary, the uncontradicted evidence confirms that the amended decree was brazenly obtained for the sole purpose of manipulating federal immigration law and had no legitimate state purpose whatsoever. Petitioner's equal protection claim cannot prevail under such circumstances.

CONCLUSION

Having failed to prove that, prior to his eighteenth birthday, he was in the sole legal custody of his mother, Petitioner has not carried his burden of proving his derivative naturalization under § 1432(a). His petition for review is, therefore,

DENIED.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the
Board of
Immigration Appeals

File: A38 097 162 – San Antonio Date: Mar 2, 2005

In re: JAVIER ONTONIEL BUSTAMONTE-BARRERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Simon M. Azar-Farr, Esquire

ON BEHALF OF DHS: Jane H. Thomson
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] – Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] – Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonmen

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony.

APPLICATION: Termination

The respondent appeals from an Immigration Judge decision, dated October 8, 2003, ordering him removed from the United States. This Board, on October 10, 2003, had previously sustained a Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization

Service) appeal from an Immigration Judge order finding that the respondent was a United States citizen. At that time we remanded the record for the entry of an order of removal.

To the extent the respondent argues the Immigration Judge should not have amended his order and issued his new decision without notice, we note, however, that our order was properly served on the respondent and he has been allowed an opportunity to appeal from the Immigration Judge's entry of the order of removal. Further, the respondent had previously admitted his removability, the only issue decided in the Immigration Judge's order (Tr. at 10-12).

After review of the respondent's arguments on appeal, we affirm our decision of October 3, 2003, for the reasons stated therein and will dismiss the appeal.

ORDER: The appeal is dismissed for the reasons stated in our decision of October 3, 2003.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge

File A 38 097 162

In the Matter of Javier Ontoniel BUSTAMANTE-Barrera Respondent	In Remanded Removal Proceedings **Order of the Immigration Judge**

The instant proceedings have been remanded pursuant, to Board Decisi [sic] and Order dated October 3, 2003. The Board has remanded for the Court to " . . . issue and order of removal." Based on the Board's decision which is hereby incorporated herein by reference as ifffully [sic] set forth herein, the Court finds allegation #1 in the Notice to Appear to be sustained. The court further finds the charges in the Notice to Appear and the lodged charge on the form I-261 dated 8-12-02 to be found supported by clear and convincing evidence. Based on the Board remand order, the following order will be entered:

> IT IS ORDERED that the respondent be removed from the United States to Mexico on the charges contained in the Notice to Appear and the lodged charge in the form I-261.

Date: OCT -8 2003

Place: San Antonio, Texas /s/ [Illegible]
(Immigration Judge)

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the
Board of
Immigration Appeals

File:A38 097 162 – San Antonio Date: Oct. 03, 2003

In re: JAVIER ONTONIEL BUSTAMONTE-BARRERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Simon Reyes-Vidal, Esquire

ON BEHALF OF DHS: Jane H. Thomson
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] – Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] – Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony.

APPLICATION: Termination

The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service), appeals the decision of the Immigration Judge dated December 3, 2002, in which the Immigration Judge terminated

removal proceedings against the respondent. The appeal will be sustained.

The issue on appeal is whether the Immigration Judge erred in terminating removal proceedings after concluding that, pursuant to former section 321(a) of the Immigration and Nationality Act, 8 U.S.C. § 1432 (repealed), the respondent automatically became a United States citizen upon his mother's naturalization[1] Section 321(a) of the Act provides that a child born outside of the United States of alien parents automatically acquires United States citizenship upon the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents, if the naturalization takes place while the child is under 18 years of age and if the child was residing in the United States as a lawful permanent resident at the time of the naturalization. The respondent does not contest the argument that "the parent having legal custody of the child" in section 321(a) refers to the parent having sole legal custody. *See Espindola v. Barber*, 152 F.Supp. 829 (N.D. Calif. 1957); *see generally Batista v. Ashcroft*, 270 F.3d 8 (1st Cir. 2001).

The record establishes that the respondent was born on January 25, 1979, in Mexico to parents who were Mexican nationals (Exh. 5). The respondent became a lawful permanent resident of the United States in February 1983 (Exh.

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[1] The respondent does not contend that he should benefit from the change in law established by the Child Citizenship Act. In *Matter of Rodriguez-Tejedor*, 23 I&N Dec. 153 (BIA 2001), the Board held that the Child Citizenship Act is not retroactive and, consequently, does not apply to an individual, such as the respondent, who was over the age of 18 years on the effective date of the Act. *See also Nehme v. INS*, 252 F.3d 415 (5th Cir. 2001).

1). In 1991, the respondent's mother obtained a divorce from the respondent's father in the Superior Court of California, County of Merced (Exh. 5). The divorce decree awarded joint legal custody of the respondent to his father and his mother (*Id.*). The respondent's mother filed federal income tax returns in 1991 and thereafter in which she identified herself as "single" (*Id.*). In 1991, she included the respondent as a dependent on her tax return (*Id.*). After 1991, she did not list the respondent as a dependent (*Id.*). The respondent's mother became a naturalized citizen of the United States on February 28, 1994 (*Id.*).

The respondent was placed in removal proceedings on July 31, 2002, based upon allegations that he was convicted of two crimes involving moral turpitude and that he was convicted of a domestic violence crime (Exh. 1). The DHS later lodged a charge against the respondent that he was subject to removal based upon a conviction of an aggravated felony (Exh.1-A). The respondent conceded at his removal hearing that he would be subject to removal based upon his convictions unless he were determined to be a United States citizen (Tr. at 10-12). After the respondent was placed in removal proceedings, the respondent's mother sought and was granted a *nunc pro tunc* amended divorce decree from the Superior Court of California, County of Merced (Exh. 6). The amended decree, dated November 15, 2002, states that the respondent's mother was granted sole legal custody of the respondent (*Id.*). At the time the amended decree was issued, the respondent was 23 years old (Exh. 6).

It is well settled that an alien seeking to obtain United States citizenship must do so in compliance with the statutory requirements enacted by Congress for such purpose. *See Fedorenko v. United States*, 449 U.S. 490, 506

(1981) (there must be strict compliance with all congressionally enacted naturalization requirements); *Berenyi v. District Director, INS*, 385 U.S. 630, 637 (1967) ("it has been universally accepted that the burden is on the alien applicant to show his eligibility for citizenship in every respect."); *United States v. Ginsberg* 243 U.S. 472, 474-75 (1917) ("[n]o alien has the slightest right to naturalization unless all statutory requirements are complied with. . . .").

It is undisputed that the respondent cannot be found to have derived citizenship from his mother without the November 15, 2002, *nunc pro tunc* amended divorce decree. Therefore, the issue in the present case is whether the California Court *nunc pro tunc* amended divorce decree operates to allow the respondent to retroactively derive citizenship from his mother. We find that it does not.

The United States Supreme Court has held that citizenship has been given to the federal courts "as a specific function to be performed in strict compliance with the terms of an authorizing statute. . . . " *See United States v. Pangilinan*, 486 U.S. 875, 884 (1988). The Supreme Court further stated that "'[o]nce it has been determined that a person does not qualify for citizenship, . . . the district court has no discretion to ignore the defect and grant citizenship,'" *Id.*, quoting *Fedorenko v. United States, supra*, at 517. In addition, the Supreme Court has held that while a district court has the power to control procedural matters and cure formal defects, it cannot enlarge upon its powers by supplying facts and curing an alien's failure to provide required documentation by "embodying" a fiction in the proceedings to suggest that the naturalization petition was properly filed. *See Maney v. United States*, 278 U.S. 17, 23 (1928).

We find that the prohibition against the action of district courts in granting citizenship through curing of defects by ordering the creation of a fiction so as to render an alien eligible for citizenship where the statutory requirements had not been met should be applied as well to the decisions of state courts which issue *nunc pro tunc* orders to allow an alien to establish eligibility for citizenship for which the alien would otherwise be ineligible. To allow courts to circumvent the clear language of the naturalization requirements enacted by Congress is contrary to public policy and decades of Supreme Court jurisprudence requiring strict compliance with the statutory requirements to obtain United States citizenship.

Moreover, the promulgation by the Superior Court of California of a *nunc pro tunc* order to cure a defect in a court order it issued 12 years earlier was not performed in order to have an immediate effect upon the custody of the respondent, since he was an adult who had not been subject to any legal custody requirements of either parent for 4 years. Rather, the *nunc pro tunc* order was issued at the behest of the respondent's mother in order to allow the respondent to claim derivative citizenship from her, since without the order, the respondent would remain an alien convicted of an aggravated felony who could be removed from the United States to Mexico. Thus, the sole purpose behind the petition for the order was to remove the respondent's ineligibility for derivative citizenship.

We find that the issuance of an order by a state or federal court, the purpose of which is to alter the citizenship ineligibility of the alien subject of such order, goes against Supreme Court jurisprudence regarding naturalization and citizenship and defeats the purpose of the Congressionally enacted naturalization requirements. For

these reasons, we find that the California Superior Court *nunc pro tunc* divorce decree does not operate to establish the respondent's eligibility for derivative United States citizenship under former section 321 of the Act.

Accordingly, the appeal of the DHS will be sustained and the record will be remanded to the Immigration Judge to issue an order of removal.

ORDER: The appeal of the DHS is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for the entry of a new decision consistent with the foregoing opinion.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Antonio, Texas

File No.: A 38 097 162 December 3, 2002

In the Matter of

JAVIER O. BUSTAMANTE-BARRERA, Respondent	)	IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(A)(ii) – two crimes convicted after admission – no single scheme.

Section 237(a)(2)(E)(i) – domestic violence conviction after entry.

I-261 charge section 237(a)(2)(A) (3) – aggravated felony conviction – crime of violence.

APPLICATIONS: Motion to Terminate – section 321 claim to U.S. citizenship.

ON BEHALF OF THE RESPONDENT	ON BEHALF OF THE SERVICE
Antonio Reyes-Vidal, Esquire 154 Babcock San Antonio, Texas 70201	Jane Thompson, Esquire Assistant District Counsel INS, San Antonio, Texas

ORAL DECISION OF THE IMMIGRATION JUDGE

The instant proceedings relate to a male, native of Mexico, who was placed into removal proceedings pursuant to the issuance of a Notice To Appear dated July 31, 2002. See Exhibit 1.

The Government charges that the respondent is subject to removal for various grounds, the two grounds contained in the Notice To Appear is that the respondent is an alien who, after his admission, had been convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct. See Exhibit 1.

Additionally, it is charged that the respondent is subject to removal as an alien who, after entry, has been convicted of a crime of domestic violence. *See Id.*

The Government has further lodged on Form I-261, dated August 12th, 2002, that the respondent is subject to removal as an alien who after his admission into the United States has been convicted of an aggravated felony, crime of violence, as that term is found in section 101(a)(43)(F) incorporating Title 18, *United States Code*, Section 16 sub parts (a) and (b).

At a hearing held before the Court, the respondent, through counsel, has admitted allegations 2 through 7 in the Notice To Appear; however, there is a contention whether the respondent, in fact, is a citizen or national of the United States. The respondent, through counsel, has, in fact, conceded removability in the event the claim to citizenship is not determined in the respondent's favor. The Government, for its part, has also offered into evidence Exhibits 2, 3 and 4, relevant to the convictions. Also contained in the record is a copy of the N-600 application submitted to the Service by the respondent. That is found at Group Exhibit 5 along with supporting documents. Exhibit 6 is an amended judgment, a *nunc pro tunc* judgment dating back to the original judgment of custody back in 1991.

In the record as Exhibit 7 is the Service's denial of the respondent's N-600 application for a certificate of citizenship. The respondent in this case, his removability from this country is to be determined based on whether the respondent, in fact, is to be determined to be a citizen of the United States or more succinctly, whether the Government has established its burden relevant to allegation 1 in the Notice To Appear. The respondent's contention is that he gains automatic acquisition of citizenship, in other words, back to the date that the qualifying events have occurred, pursuant to section 321 of the Immigration and Nationality Act, hereinafter "the Act", as found in the immigration statutes prior to the amendment under the *Child Citizenship Act of 2000.* The *Child Citizenship Act of 2000* took effect in February of 2001.

The respondent being 23 years of age at present, would come within the prior section 321 of the Act. Section 321 of the Act indicates that a child born outside the United States of alien parents becomes a citizen of the United States upon fulfillment of the following conditions (the naturalization of the parent having legal custody of the child when there has been a legal separation of the parents, and if such naturalization takes place while such child is under the age of 18 years, and such child's residing in the United States pursuant to a lawful admission for permanent resident at the time of the naturalization of the parent last naturalized under clause 3 or thereafter begins to reside permanently in the United States.

The record is complete as far as the respondent's admission for permanent resident. The documents indicate, in the allegations in the Notice To Appear, specifically admitted by the respondent through counsel, that the respondent was admitted to the United States at Roma,

Texas, on or about February 2, 1983 as a lawful admitted permanent resident. The respondent, of course, at that point in time, was approximately four years of age or thereabouts upon his admission into this country for permanent residence. The respondent is, and has been at all times admitted for permanent residence until the Service has brought him within removal proceedings at the current time.

Group Exhibit 6, in the record, the N-600 application for a certificate of citizenship, as well as the supporting documents, contains, *inter alia*, the respondent's mother's and father's dissolution of marriage. The exhibit indicates that the respondent's mother was the petitioner in the divorce of the respondent's parents. That the document was entered of record by the court and filed in the Merced County records on February 4, 1991. The document indicates that the dissolution occurred on January the 10th of 1991, at a time when the respondent was under 18 years of age. The document further indicates, pursuant to the proposed judgment, that "the sole physical custody of the minor children of the parties, namely Javier O. Bustamante, age 12, born 1/25/79 . . . is awarded to the petitioner with joint legal custody awarded to both parties". "Visitation is awarded to the respondent every other weekend and any other time with prior notice". The critical question to be determined is whether the respondent's mother and father were in a "legal separation" wherein the respondent's mother, the petitioner, in the divorce had "legal custody of the child". I find that the record is clear that taking substance over form, that the respondent's mother, in fact, did have legal custody of the respondent, if not actual physical custody of the respondent. The purpose, of course, of section 321 is to accord

automatically citizenship to a child wherein the parent, having physical custody and control of such child, becomes a naturalized citizen therefore conferring upon the minor child the same status. It would be unconscionable in this Court's mind that the respondent would not have acquired automatic citizenship pursuant to his mother's naturalization in this country in that she actually had physical custody of the respondent at all times since the divorce. It is obvious that the respondent did not live with his father; that his mother having legal custody as well as physical custody, meets the definition of section 321(a)(3) of the Act. In order to accept the Service's position that since there was a "legal custody to the respondent's father" that, therefore, the respondent did not acquire citizenship automatically, is ia [sic] very restrictive reading of the naturalization or the citizenship requirements or provisions of section 321, one that goes beyond what is the intent of Congress. It is obvious that Congress intended to impart citizenship to children of parents when there had been a legal separation and dissolution of such marriage and when such custodial parent maintained physical custody of the child as well as "legal custody". In this case, I find that the real facts of the case indicate that the mother, being the party having legal custody, also had physical custody and, therefore, the respondent, in fact, did acquire citizenship before his 18th birthday and pursuant to the documents submitted by the respondent at Group Exhibit 5 as well as 6. Accordingly, I find that the first allegation in the Notice To Appear has not been evidenced by the clear and convincing standard. This Court, of course, cannot accord citizenship on the respondent, however, has jurisdiction to determine that the Service has failed to meet the burden relevant to Allegation 1 and, accordingly, the proceedings will be terminated.

/s/ Howard Van Winkle
HOWARD VAN WINKLE
Immigration Judge

San Antonio, Texas

CERTIFICATE PAGE

I hereby certify that the attached proceeding before JUDGE HOWARD VAN WINKLE, in the matter of:

JAVIER ONTONIEL BUSTAMANTE-BARRERA

A 38 097 162

San Antonio, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office For Immigration Review.

/s/ Patricia L. McDonald
(Patricia L. McDonald,
Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

December 31, 2002
(Completion Date)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60247

JAVIER ONTONIEL BUSTAMANTE-BARRERA

Petitioner

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 20, 2006)

(Opinion 4/20/06, 5 Cir., ___, ___ F.3d ___

Before JONES, Chief Judge, WIENER, and PRADO, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. AND 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jacques Wiener
United States Circuit Judge

Attorney or Party Without Attorney (*Name and Address*):	Telephone No.: (209) 826-5905	*For Court Use Only*
Edith B. Bustamante 119 W. "T" St. Los Banos, CA 93635 ~~Attorney For:~~ In Pro Per		
Superior Court of California, County of Merced Street Address: 21st and M. Streets Mailing Address: County Courts City and Zip Code: [Illegible] Branch Name: Merced, CA [Illegible]		
Marriage Of Petitioner: Edith B. Bustamante Respondent: Tomas Bustamante		CLK 1287.00 E01-70 R07-85
JUDGMENT (Filed Feb. 4, 1991) ☒ Dissolution ☐ Status only ☐ Reserving jurisdiction over termination of marital status ☐ Legal separation ☐ Nullity Date marital status ends: 1-10-91		Case Number: 98218

1. This proceeding was heard as follows: ☒ default or uncontested ☒ by declaration under Civil Code, § 4511 ☐ contested

a. Date: Dept: Rm.:

b. Judge (*name*): ☐ Temporary judge

c. ☐ Petitioner present in court
☐ Attorney present in court (*name*):

d. ☐ Respondent present in court
☐ Attorney present in court (*name*):

e. ☐ Claimant present in court (*name*):
☐ Attorney present in court (*name*):

2. The court acquired jurisdiction of the respondent on (*date*): 7-9-90

☒ Respondent was served with process
☐ Respondent appeared

3. THE COURT ORDERS, GOOD CAUSE APPEARING:

a. ☒ Judgment of dissolution be entered. Marital status is terminated and the parties are restored to the status of unmarried persons

(1) ☒ on the following date (*specify*): 1-10-91

(2) ☐ on a date to be determined on noticed motion of either party or on stipulation.

b. ☐ Judgment of legal separation be entered.

c. ☐ Judgment of nullity be entered and the parties are declared to be unmarried persons on the ground of (*specify*):

4. THE COURT FURTHER ORDERS:

a. Jurisdiction is reserved to make other and further orders necessary to carry out this judgment.

b. ☒ Wife's former name be restored (*specify*): EDITH BARRERA

c. ☒ This judgment shall be entered nunc pro tunc as of (*date*): 1-10-91

d. ☐ Jurisdiction is reserved over all other issues and all present orders remain in effect except as provided below.

e. Any payment for spousal or family support contained in this judgment shall terminate upon the death of the payee unless otherwise provided.

f. ☒ Other (*specify*): SEE ATTACHMENT TO JUDGMENT

THE DISTRICT ATTORNEY CHILD SUPPORT REPORT IS INCORPORATED HEREIN BY REFERENCE AND MADE A PART OF THIS JUDGMENT. THE PARTIES ARE ORDERED TO COMPLY WITH THE PROVISIONS OF SAID REPORT.

Date: _____
Judge of the Superior Court

5. Number of pages attached: TWO
☒ Signature follows last attachment

– NOTICE –

1. Please review your will, insurance policies, retirement benefit plans, and other matters you may want to change in view of the dissolution or annulment of your marriage. Ending your marriage may automatically change a disposition made by your will to your former spouse.

2. A debt or obligation may be assigned to one party as part of the division of property and debts, but if that party does not pay the debt or obligation, the creditor may be able to collect from the other party.

3. If you fail to pay any court-ordered child support, an assignment of your wages will be obtained without further notice to you.

MERCED COUNTY DISTRICT ATTORNEY GORDON G. SPENCER, DISTRICT ATTORNEY FAMILY SUPPORT DIVISION 2222 M STREET MERCED, CALIFORNIA 95340	
Petitioner/Plaintiff: EDITH B. BUSTAMANTE Respondent/Defendant: TOMAS BUSTAMANTE	CASE NUMBER: 98218 DAFSD NUMBER: 26938

DISTRICT ATTORNEY CHILD SUPPORT REPORT

The Merced County District Attorney, Family Support Division has reviewed the following documents: PROPOSED JUDGMENT, INCOME AND EXPENSE DECLARATIONS.

THE FOLLOWING IS MADE A PART OF THE COURT'S ORDER:

Child support of the minor child/ren of the parties shall be $180.00 per child per month beginning on 2-1-91, and to be payable by: ( ) Petitioner (X) Respondent.

The above child support is calculated on net monthly income of:

Petitioner: $331.34; Respondent: $1,497.61.

Child/ren's name(s) and date(s) of birth: JAVIER BUSTAMANTE, 1-25-79, EDITH BUSTAMANTE 8-5-82 AND LOIDA BUSTAMANTE 3-25-85.

Child support payments are to be by wage assignment.

Child support payments shall continue until further order of the court, or until the child marries, dies, is emancipated, reaches 19, or reaches 18 and is not a full-time student residing with a parent, whichever occurs first.

Medical insurance shall be maintained for the child/ren as is available at no cost or reasonable cost for each party. Medical insurance is considered reasonable in cost if it is an employment-related or other group health insurance regardless of service delivery mechanism.

Child support payments provided herein shall be payable to:

( ) Petitioner;

( ) Respondent;

(X) Merced County District Attorney Family Support Division

Dated: 1-11-91 /s/ Lillette Correia
Family Support Officer

Attachment to the Judgment

THE COURT ORDERS THAT:

1. The sole physical custody of the minor children of the parties namely, JAVIER O. BUSTAMANTE, age 12, born 1-25-79, EDITH Y. BUSTAMANTE, age 8½, born 8=5-92 [sic] and LOIDA BUSTAMANTE, age 5½, born 3-25-85 is awarded to the Petitioner with joint legal custody warded to both parties. Visitation is awarded to the Respondent every-other weekend and any other time with prior notice.

2. The court further orders that the Respondent pay for and as child support the sum of $180 per child

commencing immediately and continuing until the children reach the age of majority, become emancipated, die or until further order of this court. The sum shall be paid to the Family Support Division, 2222 M. St., Merced, CA 95340. Total amount of child support per month is $540.00.

Dated: Feb. 4 1991 /s/ [Illegible] Barrett
JUDGE OF THE SUPERIOR COURT

Attorney or Party Without Attorney (*Name, state bar number, and address*): Susan J. Hall-Martinez #160222 Law Firm of Susan J. Hall-Martinez 1826 "K" Street Merced, CA 95340 Telephone No.: (209) 726-3578 Fax No.: Attorney For (Name): Edith Bustamante (Barrera)	*For Court Use Only*
Superior Court of California, County of MERCED Street Address: 1901 "G" Street Mailing Address: Merced, CA 95340 City and Zip Code: Branch Name:	
Marriage Of Petitioner: Edith Bustamante Respondent: Tomas Bustamante	
AMENDED JUDGMENT (Filed Nov. 15, 2002) ☒ Dissolution ☐ Status only ☐ Reserving jurisdiction over termination of marital status ☐ Judgment on reserved issues ☐ Legal Separation ☐ Nullity Date marital status ends: 1-10-91	Case Number: 98218

1. ☐ This judgment
   ☐ contains personal conduct restraining orders
   ☐ modifies existing restraining orders.

   The restraining orders are contained on page(s) of attachment. They expire on (*date*):

2. This proceeding was heard as follows: ☒ default or uncontested ☒ by declaration under Fam. Code, § 2336 ☐ contested

   a. Date: Dept: Rm.:

   b. Judicial officer (*name*) Gerald W. Corman
      ☐ Temporary judge

   c. ☐ Petitioner present in court
      ☐ Attorney present in court (*name*):

   d. ☐ Respondent present in court
      ☐ Attorney present in court (*name*):

   e. ☐ Claimant present in court (*name*):
      ☐ Attorney present in court (*name*):

   f. ☐ Other (*specify name*):

3. The court acquired jurisdiction of the respondent on (*date*): 7-9-90

   ☒ Respondent was served with process
   ☐ Respondent appeared

4. THE COURT ORDERS, GOOD CAUSE APPEARING:

   a. ☒ Judgment of dissolution be entered. Marital status is terminated and the parties are restored to the status of unmarried persons

(1) ☒ on the following date (*specify*): 1-10-91

(2) ☐ on a date to be determined on noticed motion of either party or on stipulation.

b. ☐ Judgment of legal separation be entered.

c. ☐ Judgment of nullity be entered and the parties are declared to be unmarried persons on the ground of (*specify*):

d. ☒ This judgment shall be entered nunc pro tunc as of (*date*): 1-10-91

e. ☐ Judgment on reserved issues.

f. ☒ Wife's ☐ Husband's former name be restored (*specify*): EDITH BARRERA

g. ☐ Jurisdiction is reserved over all other issues and all present orders remain in effect except as provided below.

h. ☐ This judgment contains provisions for child support or family support. Both parties shall complete and file with the court a *Child Support Case Registry Form* (form 1285.92) within 10 days of the date of this judgment. The parents shall notify the court of any change in the information submitted within 10 days of the change by filing an updated form. The forms *Notice of Rights and Responsibilities* (form 1285.78) and *Information Sheet on Changing a Child Support Order* (form 1285.79) are attached.

4. i. ☐ A marital settlement agreement between the parties is attached.

j. ☒ A written stipulation for judgment between the parties is attached.

k. ☒ Child custody and visitation is ordered as set forth in the attached.

- ☐ Marital settlement agreement, stipulation for judgment, or other written agreement.
- ☐ *Child Custody and Visitation Order Attachment* (form 1296.31A)
- ☒ Other (*specify*): See attachment.

l. ☒ Child support is ordered as set forth in the attached

- ☐ Marital settlement agreement, stipulation for judgment, or other written agreement.
- ☐ *Child Support Information and Order Attachment* (form 1296.31B)
- ☐ *Non-Guideline Child Support Findings Attachment* (form 1296.31B(1))
- ☐ *Stipulation to Establish or Modify Child Support Order* (form 1285.27)
- ☒ Other (*specify*): See attachment

m. ☐ Spousal support is ordered as set forth in the attached

- ☐ Marital settlement agreement, stipulation for judgment, or other written agreement.
- ☐ *Spousal or Family Support Order Attachment* (form 1296.31C)
- ☐ Other (*specify*)

☐ NOTICE: It is the goal of this state that each party shall make reasonable good faith efforts

to become self-supporting as provided for in Family Code section 4320. The failure to make reasonable good faith efforts may be one of the factors considered by the court as a basis for modifying or terminating spousal support.

n. ☐ Parentage is established for children of this relationship born prior to the marriage.

o. ☐ Other (*specify*):

Each attachment to this judgment is incorporated into this judgment, and the parties are ordered to comply with each attachment's provisions.

Jurisdiction is reserved to make other orders necessary to carry out this judgment.

XXXXXXXXXXXXXXXXXX
Judge of the Superior Court

Date:

5. Number of pages attached: two
☒ Signature follows last attachment

NOTICE

Please review your will, insurance policies, retirement benefit plans, credit cards, other credit accounts and credit reports, and other matters that you may want to change in view of the dissolution or annulment of your marriage, or your legal separation. Dissolution or annulment of your marriage may automatically change a disposition made by your will to your former spouse. A debt or obligation may be assigned to one party as part of the division of property and debts, but if that party does not pay the debt or obligation, the creditor may be able to collect from the other party.

An earnings assignment will automatically be issued if child support, family support, or spousal support is ordered.

Any party required to pay support must pay interest on overdue amounts at the "legal rate," which is currently 10 percent.

MERCED COUNTY DISTRICT ATTORNEY GORDON G. SPENCER, DISTRICT ATTORNEY FAMILY SUPPORT DIVISION 2222 M STREET MERCED, CALIFORNIA 95340	)	
Petitioner/Plaintiff: EDITH B. BUSTAMANTE Respondent/Defendant: TOMAS BUSTAMANTE	)	CASE NUMBER: 98218 DAFSD NUMBER: 26938

DISTRICT ATTORNEY CHILD SUPPORT REPORT

The Merced County District Attorney, Family Support Division has reviewed the following documents: PROPOSED JUDGEMENT, INCOME AND EXPENSE DECLARATIONS.

THE FOLLOWING IS MADE A PART OF THE COURT'S ORDER:

Child support of the minor child/ren of the parties shall be $180.00 per child per month beginning on 2-1-91 and to be payable by:

( ) Petitioner (X) Respondent.

The above child support is calculated on net monthly income of:

Petitioner: $331.34; Respondent: $1497.61

Child/ren's name(s) and date(s) of birth: JAVIER BUSTAMANTE 1-25-79, EDITH BUSTAMANTE 8-5-82 AND LOIDA BUSTAMANTE 3-25-85.

Child support payments are to be by wage assignment.

Child support payments shall continue until further order of the court or until the child marries, dies, is emancipated, reaches 19, or reach 18 and is not a full-time student residing with a parent, whichever occurs first.

Medical insurance shall be maintained for the child/ren as is available at no cost or reasonable cost for each party. Medical insurance is considered reasonable in cost if it is an employment-related or other group health insurance regardless of service delivery mechanism.

Child support payments provided herein shall be payable to:

( ) Petitioner;
( ) Respondent;
(X) Merced County District Attorney Family Support

Dated: 1-11-91 /s/ [Illegible]
Family Support Officer

Attachment to Amended Judgment

The parties hereto, stipulate to amend the Judgment, filed February 4, 1991, as follows:

THE COURT ORDERS THAT:

1. The sole legal and sole physical custody of the minor children of the parties, namely, JAVIER O. BUSTAMANTE, born 1-25-79, EDITH Y. BUSTAMANTE, born 8-5-82, and LOIDA BUSTAMANTE, born 3-25-85, is awarded to Petitioner, EDITH B. BUSTAMANTE, commencing February 4, 1991, and continuing until further order of the Court.

2. Respondent, TOMAS BUSTAMANTE, shall be awarded visitation with the minor children, every other weekend and any other time with prior notice, commencing February 4, 1991, and continuing until further order of the Court.

3. Respondent shall pay the sum of $180.00 per child, commencing immediately and continuing until the children reach the age of majority, become emancipated, die or until further order of this court. The sum shall be paid to the Merced County Family Support. The total amount of child support per month is $540.00.

Dated: 11-11-02 /s/ Edith Barrera
EDITH BUSTAMANTE (BARRERA)
Petitioner

Dated: 11-7-02 /s/ Tomas Bustamante
TOMAS BUSTAMANTE
Respondent

Dated: _____ /s/ Gerald W. Corman
COMMISSIONER
GERALD W. CORMAN

State of CA

County of MERCED

On NOV. 7th, 2002 (Date) before me, SCOTT WITT, (Name, Title of Officer – E.G., "Jane Doe, Notary Public", personally appeared TOMAS BUSTAMANTE (Name(s) of Signer(s),

☐ personally known to me – **OR** –

☒ proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/ they executed the same in his/her/ their authorized capacity(ies), and that by his/her/ their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

[SEAL]
SCOTT WITT
COMM. #1222636
Notary Public-
California
MERCED COUNTY
My Comm. Exp.
May 31, 2003
ESI1

WITNESS my hand and official seal.

/s/ Scott Witt
Signature of Notary

SIGNATURE OF NOTARY

OPTIONAL

Though the data below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent reattachment of this form.

CAPACITY CLAIMED BY SIGNER	DESCRIPTION OF ATTACHED DOCUMENT
☒ INDIVIDUAL ☐ CORPORATE OFFICER _____ TITLE(S)	AMENDED JUDGMENT-DISSOLUTION OF MARRIAGE TITLE OR TYPE OF DOCUMENT
☐ **PARTNER(S)** ☐ **LIMITED** ☐ **GENERAL** ☐ **ATTORNEY-IN-FACT** ☐ **TRUSTEE(S)** ☐ **GUARDIAN/ CONSERVATOR** ☐ **OTHER** _____	3 NUMBER OF PAGES 11/7/02 DATE OF DOCUMENT _____ SIGNER(S) OTHER THAN NAMED ABOVE
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ALMA MUNOZ –
NOTARY PUBLIC FOR THE STATE OF TEXAS

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State of Texas

County of Travis

Amended Judgment-Dissolution of Marriage

On November 11, 2002 before me Alma Munoz personally appeared Edith Barrera proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her authorized capacity and that by her signature on the instrument the person or the entity upon behalf of which the person acted executed the instrument.

/s/ Edith Barrera
EDITH BARRERA

Identification provided to Notary Public: TX Drivers License No. 11276662

SUBSCRIBED and SWORN to before me on this the 11th Day of November 2002. Number of Pages of Amended Judgment: 3 Pages-Attached.

/s/ Alma Munoz
Alma Munoz

Notary Public for the
State of Texas

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11/12/03

[SEAL]
ALMA MUNOZ
Notary Public
State of Texas
Comm. Exp. 11-12-2003

No. 06-384

In the Supreme Court of the United States

JAVIER OTONIEL BUSTAMANTE-BARRERA,
PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 8 U.S.C. 1432(a) (1994), a child born abroad to alien parents became a citizen of the United States, upon satisfaction of a residency requirement, if both parents were naturalized as United States citizens while the child was under the age of 18. Section 1432(a) also provided, however, for various exceptions to the requirement that both parents be naturalized, including the situation in which the parents were legally separated and the parent having legal custody was naturalized. The question presented is:

Whether petitioner's mother had sole "legal custody" of petitioner as a child under 8 U.S.C. 1432(a)(3) (1994), where petitioner's divorced parents had joint legal custody pursuant to a 1991 divorce decree, but petitioner's mother obtained an amended divorce decree, after petitioner became an adult and was in removal proceedings, that awarded her sole legal custody of petitioner retroactive to the date of the original divorce decree.

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In the Supreme Court of the United States

No. 06-384

JAVIER OTONIEL BUSTAMANTE-BARRERA,
PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 447 F.3d 388. The order (Pet. App. 29a) and decision (Pet. App. 36a-41a) of the immigration judge and the decisions of the Board of Immigration Appeals (Board) (Pet. App. 27a-28a, 30a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 20, 2006 (Pet. App. 1a). A petition for rehearing was denied on June 20, 2006 (Pet. App. 42a-43a). The petition for a writ of certiorari was filed on September 14, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Article I of the Constitution assigns to Congress the power "[t]o establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4. In the exercise of that power, Congress has afforded certain classes of persons United States citizenship by statute.

The statute at issue here, 8 U.S.C. 1432(a) (1994), provided that children who were born outside of the United States, and whose parents both were aliens, became citizens of the United States upon naturalization of their parents, if certain requirements were satisfied. Under that statute, the child acquired citizenship as a result of (1) the naturalization of both parents before the child's eighteenth birthday, and (2) the child's lawful residence in the United States while the child was under age 18. See 8 U.S.C. 1432(a)(1), (4) and (5) (1994). Under limited circumstances, however, the first requirement could be satisfied through the naturalization of only one parent. If one parent was deceased, naturalization of the surviving parent while the child was under age 18 satisfied the parental naturalization requirement. 8 U.S.C. 1432(a)(2) (1994). Likewise, if the child's parents were legally separated, naturalization of the parent having legal custody of the child sufficed. 8 U.S.C. 1432(a)(3) (1994).[1] And, if the child was born out of wedlock and paternity had not been established by legitimation, naturalization of the mother before the child reached age 18 met the parental naturalization requirement.[2] *Ibid.*

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[1] Petitioner's derivative citizenship claim is under Section 1432(a)(3).

[2] Section 1432(a) was repealed effective February 27, 2001, by the Child Citizenship Act of 2000 (CCA), Pub.L. No. 106-395, § 103(a), 114 Stat. 1632. The CCA applies only to aliens who were under the age of

2. Petitioner was born in Mexico in 1979 to Mexican nationals. Pet. App. 2a. He was admitted to the United States, along with his parents, in 1983 as a lawful permanent resident. *Ibid.* In 1991, petitioner's parents divorced in California. *Id.* at 2a, 44a-50a. Their divorce decree awarded his mother "sole *physical* custody" of petitioner, but awarded both his parents "joint *legal* custody." *Id.* at 2a, 49a. After his parents' divorce, petitioner "resided exclusively with his mother." *Id.* at 2a. Under the terms of his parents' joint legal custody, however, petitioner's father retained visitation rights. *Id.* at 3a, 49a. On February 28, 1994, while petitioner was still under the age of 18, his mother became a naturalized citizen of the United States. *Id.* at 3a, 32a. His father never naturalized. *Id.* at 2a.

In 2000, petitioner was convicted in Texas of assault causing bodily injury to a family member. Pet. App. 3a. In 2002, petitioner was convicted in Texas of aggravated assault with a deadly weapon and assault resulting in bodily injury. *Ibid.* For his 2002 convictions, petitioner was sentenced to a ten-year term of imprisonment. *Ibid.*

3. In August 2002, the Department of Homeland Security (DHS) initiated removal proceedings based on (1) petitioner's convictions for two crimes involving moral turpitude; and (2) petitioner's conviction for an aggravated felony. Pet. App. 3a; see 8 U.S.C. 1227(a)(2)(A)(ii), (iii) and (E)(i).

Before the immigration judge, petitioner admitted his convictions but contended that he was not subject to removal because he had automatically derived United States citizenship under Section 1432(a) based upon his

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18 on the effective date; petitioner does not meet that condition. His derivative citizenship claim is therefore governed by 8 U.S.C. 1432(a) (1994).

mother's naturalization in 1994. Pet. App. 3a-4a. He contended that he satisfied Section 1432(a)'s requirements because, at the time of his mother's naturalization, he was under the age of 18, under her legal custody, and residing in the United States as a lawful permanent resident. *Id.* at 4a. Petitioner conceded that, in the event his citizenship claim failed, he was removable as charged. *Id.* at 32a.

4. On November 15, 2002, after he was placed in removal proceedings, and when he was already 23 years old, his mother sought to change petitioner's legal custody status retroactively. Pet. App. 4a, 51a-62a. Specifically, at his mother's request, and without any objection from petitioner's father, a California court issued a *nunc pro tunc* amended divorce decree (amended decree) "which purported to award petitioner's mother *sole* legal custody retroactively effective to February 4, 1991." *Id.* at 4a, 58a. In support of the amended decree, petitioner's mother filed a declaration stating that "'[t]he purpose' for seeking the order was 'to satisfy requirements of the Department of Immigration and Naturalization'" regarding petitioner. *Id.* at 4a.

5. After considering the amended decree, the immigration judge concluded that petitioner met the requirements for derivative citizenship under Section 1432(a) and terminated the removal proceedings. Pet. App. 5a.

6. DHS appealed the immigration judge's decision to the Board. Pet. App. 5a. On October 3, 2003, the Board sustained DHS's appeal. *Id.* at 30a-35a. The Board observed that "[i]t is undisputed that [petitioner] cannot be found to have derived citizenship from his mother without the November 15, 2002, *nunc pro tunc* amended divorce decree." *Id.* at 33a. The Board refused to give effect to the amended decree. It pointed

out that the amended decree was not issued "to have an immediate effect upon the custody of [petitioner], since he was an adult who had not been subject to any legal custody requirements of either parent for 4 years." *Id.* at 34a. Rather, the Board explained, petitioner's mother sought the amended decree solely to prevent petitioner from being "removed from the United States to Mexico" by rendering him eligible "to claim derivative citizenship." *Ibid.* The Board concluded that to honor the amended decree in these circumstances would be "contrary to public policy and decades of Supreme Court jurisprudence requiring strict compliance with the statutory requirements to obtain United States citizenship," and would "defeat[] the purpose of the Congressionally enacted naturalization requirements." *Ibid.* The Board accordingly sustained DHS's appeal and remanded the case to the immigration judge, who ordered petitioner removed from the United States. *Id.* at 35a.

7. After the immigration judge entered a removal order on remand, petitioner appealed that order to the Board, arguing that by ignoring the amended decree, the Board overstepped its legal authority; violated the Full Faith and Credit Act, 28 U.S.C. 1378; and violated the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 6a. In March 2005, the Board rejected each of these arguments based on the reasoning of its October 2003 decision. *Id.* at 27a-28a.

8. The court of appeals denied petitioner's petition for review. Pet. App. 1a-26a. The court first addressed petitioner's claim, raised for the first time in that court, that Section 1432(a)(3) did not require petitioner's mother to have *sole* legal custody, and that joint custody therefore sufficed. *Id.* at 12a. Upon reviewing the text,

structure, and purpose of the statute, the court held that only sole legal custody satisfies Section 1432(a)(3). *Id.* at 13a-19a. The court of appeals then turned to the question whether petitioner, prior to his eighteenth birthday, was in the sole legal custody of his mother notwithstanding the 1991 divorce decree that awarded his parents "*joint* legal custody." *Id.* at 19a. The court first rejected petitioner's contention that the court could disregard the 1991 decree because he was, for purposes of federal immigration law, effectively in the sole legal custody of his mother prior to his eighteenth birthday. *Ibid.* While the court concluded that, under *Nehme* v. *INS*, 252 F.3d 415 (5th Cir. 2001), one State's law may not control the "legal custody" determination, the court pointed out that petitioner had "offered * * * *no* evidence" that he had "effectively been in the sole legal custody of his mother." Pet. App. 21a.

The court next rejected petitioner's contention that the Full Faith and Credit Act required the court to apply the amended decree to his naturalization claim. Pet. App. 22a. The court explained that the amended decree "does not even implicate the Full Faith and Credit Act" because petitioner's custodial status for purposes of federal immigration law "is determined by federal law." *Ibid.* The court recognized that petitioner's "custody status under state law might provide evidence of his such status for federal naturalization purposes," *ibid.*, but concluded that the court was not "*bound* by California's determination" in deciding petitioner's custodial status under the statute. *Ibid.*

The court observed that the First Circuit's decision in *Fierro* v. *Reno*, 217 F.3d 1 (2000), supported its refusal to accord effect to the amended decree. *Fierro* involved "strikingly similar" facts (Pet. App. 24a) be-

cause there, as here, an adult alien sought to avoid deportation by having his parents obtain a *nunc pro tunc* state court order retroactively altering the legal custody arrangement that existed when he was a child. *Id.* at 23a. The First Circuit refused to permit the *nunc pro tunc* order to establish "legal custody" within the meaning of Section 1432(a)(3), explaining that giving effect to the order "would open the floodgates for abuse, 'allowing] . . . state court[s] to create loopholes in the immigration laws on grounds of perceived equity or fairness.'" *Id.* at 24a (quoting *Fierro*, 217 F.3d at 6).

The court of appeals "decline[d] to credit" the amended decree because it "agree[d] with the First Circuit that relying on such a *nunc pro tunc* order to recognize derivative citizenship would create the potential for significant abuse and manipulation of federal immigration and naturalization law." Pet. App. 24a. The court qualified its holding by noting that the decision did not "foreclos[e]" the possibility that in different circumstances a "*nunc pro tunc* amended decree could enhance an alien's claim of derivative citizenship," *ibid.*, such as where, unlike here, the alien child "had in fact been in the sole legal custody of his one naturalized parent," and the amended decree was entered to recognize that reality. *Ibid.*

Finally, the court rejected petitioner's argument that the court's failure to recognize his derivative citizenship claim would violate the equal protection component of the Fifth Amendment's Due Process Clause. Pet. App. 25a-26a. The court observed that petitioner was not similarly situated to "an alien child whose parents' original separation decree placed the child in the sole legal custody of his one naturalized parent," because petitioner as a child was *not* in his mother's sole legal cus-

tody. *Id.* at 25a. The court concluded that there was nothing irrational in treating petitioner differently from alien children who became citizens by virtue of having been in the sole legal custody of their naturalized parent, because "the amended decree was brazenly obtained for the sole purpose of manipulating federal immigration law and had no legitimate state purpose whatsoever." *Id.* at 26a.

ARGUMENT

Petitioner contends (Pet. 16-22) that the court of appeals erred in applying federal law to determine the effect of the amended divorce decree on his legal custody status and further contends (Pet. 6-12) that the decision conflicts with the decisions of other circuits. Those contentions lack merit. The court of appeals' decision is correct and does not conflict with the decision of any other circuit. In fact, the First Circuit is the only other court of appeals that has squarely addressed the question presented, and it resolved that question in the same manner as the decision below. No further review is warranted.

1. The court of appeals correctly held that it was not bound by the state court's amended divorce decree for purposes of determining petitioner's legal custody status under former 8 U.S.C. 1432(a)(3) (1994). See Pet. App. 22a-23a. Petitioner does not dispute (Pet. 17) that the meaning of the term "legal custody" is a question of federal law. The Board and court of appeals are not required by federal law to recognize a state court order when doing so would defeat the purpose of the federal statute in which the term appears. Recognizing the amended decree here would do precisely that. As the First Circuit has explained, "both the language of the automatic citizenship provision and its apparent under-

lying rationale suggest that Congress was concerned with the legal status of the child *at the time* that the parent was naturalized and during the minority of the child." *Fierro*, 217 F.3d at 6. The court elaborated that "Congress clearly intended that the child's citizenship should follow that of the parent who *then* had legal custody," because "Congress wanted the child to be protected against separation from the parent having legal custody during the child's minority." *Ibid.* (emphasis added). Recognizing a state court order that altered the legal custody arrangement the alien had as a child after the alien became an adult—solely for the purpose of preventing the alien from being deported—"would hardly * * * serve[]" Congress's purpose and "would in substance allow the state court to create loopholes in the immigration laws." *Ibid.* Accord Pet. App. 25a (refusing to reward "such blatant manipulation of federal law").

Petitioner insists (Pet. 16-22) that state law should be controlling, but he points to no case law or other source of authority that supports his proposed approach in these unusual circumstances.[3] In fact, the law appears to be uniformly against him. See, *e.g.*, *Minasyan* v. *Gonzales*, 401 F.3d 1069, 1080 n.20 (9th Cir. 2005)

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[3] Petitioner contends that "[t]he government has argued that the relevant state's domestic relations law—not federal law—should determine whether a parent is legally separated under § 1432(a)." Pet. 19 (citing Brief of the Attorney General, *Nehme* v. *Reno*, No. 00-60111, 2000 WL 33981409, at *13-*14 (5th Cir. filed June 26, 2000)). The government's defense of the Board's application of state law to decide the "legal separation" issue in that case is not inconsistent with the government's position in this case that the Board was correct in refusing to give effect to the amended legal custody decree. *Nehme* did not present the abuse-of-process concerns that justify applying a federal rule here to prevent manipulation of the immigration laws and frustration of Congress's intent.

(citing *Fierro* approvingly for the proposition that "[r]etroactively changing the legal relationship would create a legal fiction and would not serve the purpose of the [derivative citizenship] statute"); *Miller* v. *Christopher*, 96 F.3d 1467, 1473 (D.C. Cir. 1996) ("To allow [the alien] to gain the retroactive benefit of a state court judgment would undercut Congress's clearly stated requirements and would have the effect of establishing citizenship in ways inconsistent with federal legislation."), aff'd, 523 U.S. 420 (1998); cf. *De Sylva* v. *Ballentine*, 351 U.S. 570, 580-581 (1956) (observing that while it is proper in interpreting a federal statute "to draw on the ready-made body of state law to define" a word implicating family relationships, "[t]his does not mean that a State would be entitled to use the word 'children' in a way entirely strange to those familiar with its ordinary usage").[4]

The court of appeals' refusal to give effect to the legal fiction that the amended decree purported to establish provides no basis to conclude that the court would have refused to give effect to a state court order in different circumstances, where the order awarded legal custody of the alien child to one parent at the time the

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[4] Petitioner does not address whether applying state law as the rule of decision in this case would produce a different outcome. Because there is no support for the proposition that state law should dictate the legal force to be accorded a state court order obtained and issued for the sole purpose of affecting the implementation of federal law in immigration proceedings, the court of appeals' decision does not merit this Court's review regardless of whether the outcome would be different under state law. Nevertheless, it bears noting that the Supreme Court of California has held that "a nunc pro tunc order cannot declare that something was done which was not done." *Johnson & Johnson* v. *Superior Ct.*, 695 P.2d 1058, 1066 (1985) (citation omitted).

alien was a child. The court of appeals observed that an alien's "custody status under state law might provide evidence of his such status for federal naturalization purposes." Pet. App. 22a. And the court went so far as to suggest that even a *nunc pro tunc* state court decree could be given effect in a case in which that decree "legitimately demonstrate[d] that an alien child had in fact been in the sole legal custody of his one naturalized parent prior to his eighteenth birthday." *Id.* at 24a. The court thus correctly recognized that state law has a role to play in informing the meaning of terms in federal immigration laws, such as "legal custody," that deal with domestic relations, while ensuring at the same time that state law is not used to manipulate the outcome of federal proceedings.

2. Only two other circuits have addressed the meaning of the term "legal custody" in Section 1432(a)(3), and neither one presents a conflict with the decision below. Petitioner cites (Pet. 8) *Fierro*, but his derivative citizenship claim would fail under that decision for the same reason it failed here. In that case, the alien's mother was awarded legal custody of Fierro in 1973 and never became a naturalized citizen. 217 F.3d at 3. In 1978, when Fierro was 15 years old, his father became a naturalized citizen. *Id.* at 2. Fierro submitted an amended custody judgment dated May 18, 1998, and secured four months after the immigration judge's removal order. *Id.* at 3. The decree awarded custody to Fierro's father "nunc pro tunc to September 1, 1977." *Ibid.* (citation omitted). The complaint for modification explained that "[t]his modification is necessary for [Fierro] to derive citizenship through his father and avoid being deported to Cuba." *Id.* at 4 (citation omitted; first set of brackets in original). The First Circuit rejected the assertion

that a *nunc pro tunc* amended custody decree obtained for the express purpose of affecting the outcome of federal immigration proceedings satisfied Section 1432(a)(3)'s "legal custody" requirement. *Fierro*, 217 F.3d at 6. In an opinion authored by Judge Boudin, the First Circuit reasoned, as the court of appeals did here, that reliance on such an order as the basis for derivative citizenship would open the floodgates for abuse, "allow[ing] * * * state court[s] to create loopholes in the immigration laws on grounds of perceived equity or fairness." *Ibid.* Because petitioner's citizenship claim fails under *Fierro* for the same reason it failed in the court of appeals, any possible differences in the approaches that the First Circuit and Fifth Circuit have applied to the term "legal custody" do not merit review in this case.

The only other decision to address the meaning of "legal custody" is *Bagot* v. *Ashcroft*, 398 F.3d 252 (3d Cir. 2005). But that case did not even present the question of what effect should be given under Section 1432(a) to a state court order, retroactive or otherwise, awarding legal custody of an alien child to only one parent. Instead, *Bagot* presented the question of how to determine which parent had legal custody *in the absence* of a "judicial or statutory grant of custody." *Id.* at 259.

Bagot followed the approach that the Board of Immigration Appeals adopted in *In re M-*, 3 I. & N. Dec. 850 (BIA 1950), to defining "legal custody" under a predecessor statute. *Bagot*, 398 F.3d at 259-260. There, the Board determined that if there is a "judicial determination or judicial or statutory grant of custody," then the parent to whom custody has been granted has legal custody for immigration purposes. *In re M-*, 3 I. & N. Dec. at 856. And if no such determination or grant exists,

then the parent in "actual uncontested custody" is deemed to have legal custody. *Ibid.* In *Bagot*, no legal custody determination under a divorce or custody decree existed; accordingly, the court resolved the issue on the "actual uncontested custody" prong of *In re M-*, and concluded that Bagot had been in his father's actual uncontested custody and therefore derived United States citizenship based upon his father's naturalization. Because *Bagot* does not suggest, much less hold, that it would give effect to the type of *nunc pro tunc* decree issued in this case, *Bagot* provides no basis for further review here.

3. Petitioner asserts (Pet. 9-10) that the court of appeals' decision conflicts with *Wedderburn* v. *INS*, 215 F.3d 795 (7th Cir. 2000), cert. denied, 532 U.S. 904 (2001); *Minasyan*, *supra*; and *Morgan* v. *Attorney General*, 432 F.3d 226 (3d Cir. 2005). Petitioner is incorrect. There is no conflict with those cases because they dealt with a separate and distinct statutory issue, namely the meaning of the term "legal separation" in Section 1432(a)(3).[5] The terms "legal custody" and "legal separation" are distinct concepts. In fact, the court of appeals here expressly noted that the decisions addressing "legal separation" informed its analysis, but did not "control[] it." Pet. App. 13a n.30; see *Bagot*, 398 F.3d at 267 ("[T]he two concepts are easily distinguishable."). Thus, the decision below is not a suitable vehicle for addressing the different approaches that petitioner alleges

[5] It is undisputed that petitioner's parents divorced in 1991 and that the divorce satisfied the "legal separation" requirement for purposes of Section 1432(a)(3).

the courts of appeals have taken in determining whether the "legal separation" requirement has been satisfied.[6]

4. Review clearly is unwarranted for all of the reasons discussed above. An additional reason to deny review is that Section 1432(a) was repealed effective February 27, 2001. Therefore, the pool of aliens who can potentially seek derivative citizenship under Section 1432(a) will be steadily diminishing. Far from supporting petitioner's request for review by this Court, that repeal lessens the prospective significance of petitioner's challenge and further confirms that certiorari is not warranted.[7]

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[6] None of the decisions that petitioner characterizes as applying state law (Pet. 9-10) holds or implies that effect would be given to *nunc pro tunc* state court orders with respect to legal separation that alter retroactively the legal arrangements that existed at the time the alien was a child for the sole purpose of influencing the outcome of an immigration proceeding. As mentioned in the text, pp. 9-10, *supra*, at least one of those courts has indicated precisely the opposite. See *Minaysan*, 401 F.3d at 1080 n.20. Conversely, the only two circuits that petitioner argues (Pet. 7-8) have applied federal common law to "legal separation" determinations, *i.e.*, *Nehme* v. *INS*, 252 F.3d 415 (5th Cir. 2001), and *Brissett* v. *Ashcroft*, 363 F.3d 130 (2d Cir. 2004), have looked to state law to inform their decisions. See *Nehme*, 252 F.3d at 426 ("[O]ur formulation of a federal standard by which to interpret the term 'legal separation' may also be informed by state law, particularly in this case, where there is no ready-made, federal body of law on domestic relations."); *Brissett*, 363 F.3d at 135 n.5 ("Where * * * an alien asserts that a particular form of legal process obtained through a state or nation's legal system satisfies the content of the federal standard we have established, we must first look to state or foreign law to determine how the legal process on which the alien relies affected the spouses' rights and relationship.")

[7] Contrary to petitioner's contention (Pet. 13-16), this case is not a proper vehicle to address how the term "legal custody" as used in the CCA (§ 103, 114 Stat. 1631) will be interpreted. The court of appeals did not interpret that statute, and no circuit has yet addressed that

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2007

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issue. Moreover, the CCA replaced the term "legal custody" in former Section 1432(a)(3) with the new and different term "legal and physical custody."

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No. 06-384

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JAVIER OTONIEL BUSTAMANTE-BARRERA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

A. Respondent's restatement of the question presented confuses the issue.

Respondent restates the question presented. Resp. Br. at i. Bustamante's question presented asks whether state or federal law determines if a legally-separated parent has legal custody of a child under 8 U.S.C. 1432(a). Pet. at i. Respondent's question presented asks whether the *nunc pro tunc* amended divorce decree gave Bustamante's mother sole legal custody. Resp. Br. at i. Respondent's restatement of the question presented confuses the issue.

This Court will not have to decide whether the amended divorce decree gave Bustamante's mother sole legal custody. Instead, this Court will only have to decide whether state or federal law determines if Bustamante's mother had sole legal custody. The Fifth Circuit held that whether Bustamante's mother had sole legal custody was determined by federal – not state – law. App. 20a-21a. The Fifth Circuit, therefore, never examined whether the amended divorce decree gave Bustamante's mother sole legal custody under California law. *Id.* at 22a-23a. Instead, it analyzed the amended divorce decree under federal law and held that Bustamante's mother did not have sole legal custody. *Id.* at 22a-25a. If this Court decides that the relevant state's domestic-relations law determines legal custody under § 1432(a), then it can remand this case for the Fifth Circuit to consider the amended divorce decree's effect under California law. *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 29 (1981) ("Because the Court of Appeals has not addressed these issues, however, we remand the issues for consideration in light of our decision here."); Pet. at 23.

On remand, the Fifth Circuit can consider the Full Faith and Credit Act's effect.[1] Bustamante argued to the Fifth Circuit that, under the Full Faith and Credit Act, the amended divorce decree had the same effect in that court as in a California court. App. 22a. The Fifth Circuit held that the Full Faith and Credit Act did not apply because federal law determined Bustamante's legal custody.[2] Bustamante has found no case considering the Full Faith and Credit Act's effect in § 1432(a) determinations. Respondent notes that in *Fierro* v. *Reno*, 217 F.3d 1 (CA1 2000), even though the First Circuit held that state law determines § 1432(a) legal custody, it still refused to follow a *nunc pro tunc* amended divorce decree issued after the immigrant was an adult. Resp. Br. at 11-12. The First Circuit, however, never considered the Full Faith and Credit Act's effect. *Fierro*, 217 F.3d at 4-6. In fact, the First Circuit did not even mention the Full Faith and Credit Act in *Fierro*.

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[1] 28 U.S.C. 1738 ("The records and judicial proceedings of any such State * * * shall be proved or admitted in other courts within the United States * * * . Such Acts, records and judicial proceedings * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State * * * from which they are taken.").

[2] App. 22a ("Our refusal to credit the amended decree for purposes of federal immigration law does not even implicate the Full Faith and Credit Act. For purposes of § 1432(a), Petitioner's custody status prior to his eighteenth birthday is determined by federal law; it is *not* dependent on the law of any particular state. * * * Here, we do not question the amended decree's *validity* – a question that, in other circumstances, the Full Faith and Credit Act might prohibit our asking. But, the Full Faith and Credit Act certainly does not require us to accord that state decree conclusive effect in U.S. *naturalization* proceedings.") (emphasis in original).

Because neither the Fifth Circuit, nor any other circuit, has considered the Full Faith and Credit Act's effect if state-law governs § 1432(a) legal-custody determinations, the best course is to remand this case to the Fifth Circuit for initial consideration of that issue. *Pennhurst State Sch.*, 451 U.S. at 29. If this Court determines that state domestic-relations law governs § 1432(a) legal custody (the issue in Bustamante's question presented) and then remands the case for consideration of the Full Faith and Credit Act's effect, it will not address whether the amended divorce decree gave Bustamante's mother legal custody (the issue in Respondent's question presented). Because this Court will consider Bustamante's question presented, but will not have to consider Respondent's question presented, Bustamante's question presented is the better way of analyzing this case.

B. There is a circuit split on the question presented.

Respondent restates the question presented so as to eliminate any circuit split. Resp. Br. at 8-13. But, there is a circuit split on the question that this Court will actually consider in this case – whether state or federal law determines § 1432(a) legal custody.

Three Circuits – the First, Seventh, and Ninth – hold that state law determines whether a legally-separated parent has legal custody under § 1432(a),[3] while two Circuits – the Second and the Fifth – hold that federal law

[3] *Fierro*, 217 F.3d 1; *Wedderburn* v. *INS*, 215 F.3d 795 (CA7 2000), cert. denied, 532 U.S. 904 (2001); *Minasyan* v. *Gonzales*, 401 F.3d 1069 (CA9 2005); Pet. at 8-10.

determines the issue.[4] One Circuit – the Third – uses state law to determine whether parents are legally separated under § 1432(a), but uses a combination of state and federal law to determine § 1432(a) legal custody.[5] This is a clear split involving the six circuits that hear 88% of immigration appeals. Pet. at 12.

Respondent contends that cases involving legal separation under § 1432(a) should not be considered in determining whether there is a circuit split. Resp. Br. at 13-14. Instead, Respondent argues, § 1432(a) legal-separation cases must be kept distinct from § 1432(a) legal-custody cases. *Ibid.* Respondent is wrong for two reasons. First, because "legal separation" and "legal custody" are both found in the same sentence and the same subsection of § 1432(a), it makes sense to interpret the terms similarly. Second, the circuit courts have relied on legal-custody cases when interpreting the term "legal separation" and relied on legal-separation cases when interpreting the term "legal custody." In *Minasyan*, the Ninth Circuit relied on *Fierro* – a legal-custody case – in holding that state law determines whether parents are legally separated.[6] And, in this case, the Fifth Circuit

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[4] App. 1a; *Nehme* v. *INS*, 252 F.3d 415 (CA5 2001); *Brissett* v. *Ashcroft*, 363 F.3d 130 (CA2 2004); Pet. at 6-8.

[5] *Morgan* v. *Attorney General*, 432 F.3d 226 (CA3 2005); *Bagot* v. *Ashcroft*, 398 F.3d 252 (CA3 2005); Pet. at 10-11.

[6] *Minasyan*, 401 F.3d at 1077 ("Thus, we must look to California – the state with jurisdiction over Minasyan's parents' marriage – when deciding whether a legal separation occurred. *See* * * * *Fierro v. Reno*, 214 F.3d 1, 4 (1st Cir. 2000) ('[S]ubject to possible limitation, we think that the requirement of 'legal custody' in section 1432 should be taken presumptively to mean legal custody under the law of the state in question.')."); *but see Bagot*, 398 F.3d at 267 (not following *Morgan*, 432 F.3d 226 – the Third Circuit's legal-separation precedent – when

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relied on *Nehme* – a legal-separation case – in holding that federal law determines whether a parent has legal custody. App. 20a (citing *Nehme* for the proposition that "[i]nterpretation of § 1432(a)(3) is a matter of *federal law*") (emphasis in original).[7]

Even if this Court only considers legal-custody cases – as Respondent suggests – there is still a four-Circuit split. The Fifth Circuit uses federal law to determine whether a parent has legal custody,[8] while the First and Seventh Circuits use state law.[9] The Third Circuit applies its own

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deciding whether state or federal law determines legal custody under § 1432(a)).

[7] Respondent contends that "the court of appeals here expressly noted that the decisions addressing 'legal separation' informed its analysis, but did not 'control[] it.'" Resp. Br. at 13 (quoting App. 13a n.30) (alteration in Resp. Br.). In that quote, however, the Fifth Circuit was not referring to whether state or federal law determined legal custody under § 1432(a). Instead, the Fifth Circuit was discussing whether § 1432(a) required *sole* legal custody, or if *joint* legal custody was sufficient. App. 13a n.30. The Fifth Circuit, therefore, did not hold that legal-separation cases do not control whether state or federal law determines legal custody under § 1432(a).

[8] App. 22a ("For purposes of § 1432(a), Petitioner's custody status prior to his eighteenth birthday is determined by federal law; it is *not* dependent on the law of any particular state.") (emphasis in original); Pet. at 7.

[9] *Fierro*, 217 F.3d at 4 (legal custody presumptively means "legal custody under the law of the state in question"); *Wedderburn*, 215 F.3d at 799; Pet. at 8-9. Respondent contends that *Wedderburn* dealt only with legal separation, and not with legal custody. Respondent is incorrect. In *Wedderburn*, the Seventh Circuit held that "'*[l]egal custody*' and 'legal separation of the parents', as words in a federal statute, must take their meaning from federal law. * * * But federal law may point to state (or foreign) law as a rule of decision, and this is how the INS has consistently understood these terms." *Wedderburn*, 217 F.3d at 799 (emphasis added). The Seventh Circuit then examined whether, Jamaica – the relevant jurisdiction – "permits unmarried persons to obtain a 'legal separation' and an award of '*legal custody*' of

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test in determining whether a parent has legal custody: If there is a state or foreign legal decree granting custody, then it is followed; but, if there is no decree, then – as a matter of federal law – the parent with actual uncontested custody has legal custody. *Bagot*, 398 F.3d at 269-70 (Rosenn, J. and Nygaard, J., concurring).[10] Thus, four Circuits apply three different standards to determine whether parents have legal custody under § 1432(a). So, even following Respondent's view that only legal-custody cases should be considered, there is still a circuit split on the question presented.

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the children." *Ibid.* (emphasis added). *Wedderburn*, therefore, held that both legal separation and legal custody were governed by the relevant state or foreign country's law.

[10] The Third Circuit has internal dissension on its § 1432(a) legal-custody approach. Judge Becker disagreed with the *Bagot*-panel majority and said that state law controls if it "clearly determines" legal custody. *Bagot*, 298 F.3d at 263 (Op. of Becker, J.) ("I believe that our first obligation under *Fierro* is to examine New York law to see whether it clearly determines legal custody."). If state law clearly establishes legal custody – regardless whether there is a specific legal decree granting custody – then Judge Becker believed that state law must be followed. *Id.* at 263 n.9 (Op. of Becker, J.) ("another state's law might more clearly fix custody even in the absence of a decree, and under *Fierro* I would look to that law in preference to the 'actual uncontested custody' fallback"). Only if state law is silent on who has custody would Judge Becker have applied a federal rule granting legal custody to the parent who last had actual uncontested custody. *Id.* at 263 (Op. of Becker, J.) ("It is not necessary to decide that New York law *requires* a valid judicial decree to create legal custody. Rather, I conclude only that New York law is not sufficiently clear to fix INA legal custody in the absence of such a decree. Therefore, under *Fierro*, I look to New York law to see if any court has issued a valid order determining legal custody. In the absence of such an order, and there is none here, I will not attempt to divine what New York courts would do; rather, I will fall back on the 'actual uncontested custody' prong of *Matter of M–*[, 3 I.&N. Dec. 850, 1950 WL 6650 (BIA 1950)].") (emphasis in original).

C. The question presented is important even though § 1432(a) has been repealed prospectively.

Respondent contends that this Court should not grant certiorari because 8 U.S.C. 1432(a) has been repealed prospectively. Resp. Br. at 14. Respondent contends that the repeal means that "the pool of aliens who can potentially seek derivative citizenship under Section 1432(a) will be steadily diminishing." *Ibid.* While Respondent is correct that the number of people governed by § 1432(a) is diminishing, that number is still large, and § 1432(a) will continue to apply for decades. Even though § 1432(a) was repealed by the Child Citizenship Act of 2000,[11] it still applies – and will continue to apply – to people who turned eighteen before 2001. *Id.* at 2 n.2; Pet. at 2 n.1, 13. So, § 1432(a) applies to aliens who are now twenty-four or older.

As Bustamante explained in his petition, derivative citizenship often becomes an issue only when a person is convicted of a felony. Pet. at 14-16. Because people can commit felonies at any age, federal courts will have to determine whether people are derivative citizens under § 1432(a) for many years to come. Pet. at 14-16. If this Court does not address this circuit split, then the courts of appeals will continue to apply inconsistent law for decades when determining citizenship.

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[11] Pub.L. No. 106-395, 114 Stat. 1631.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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